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No. 97-215

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

ARTHUR CALDERON, Warden,
California State Prison at San Quentin, *Petitioner*,

v.

THOMAS M. THOMPSON, *Respondent*.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
NINTH CIRCUIT

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED AUGUST 4, 1997
CERTIORARI GRANTED AUGUST 4, 1997

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CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

March 25, 1995--Judge Richard A. Gadbois filed opinion in district court denying in part and granting in part habeas corpus relief.

May 30, 1995--Thomas Thompson filed notice of appeal.

June 6, 1995--Warden Calderon filed notice of appeal.

November 20, 1995--Appeal and cross-appeal argued and submitted to the Honorable Robert R. Beezer, Cynthia H. Hall, and Edward Leavy, Circuit Judges.

June 16, 1996--Opinion filed by Ninth Circuit reversing in part, and affirming in part.

August 5, 1996--Combined Petition for Rehearing and Suggestion for Rehearing En Banc filed by Petitioner Thomas Thompson.

March 16, 1997--Order and amended opinion filed by Ninth Circuit, petition for rehearing denied and suggestion for rehearing en banc rejected.

April 21, 1997--Petition for Writ of Certiorari filed in United States Supreme Court by Thomas Thompson.

June 2, 1997--Petition for Writ of Certiorari denied by United States Supreme Court.

June 5, 1997--Ninth Circuit notified of June 2, 1997 denial of petition for writ of certiorari.

June 11, 1997--Ninth Circuit issues mandate.

July 23, 1997--Motion for Relief From Judgment filed in district court.

July 23, 1997--Motion to Recall the Mandate filed in Ninth Circuit.

July 25, 1997--Motion for Relief From Judgment denied by district court.

July 28, 1997--Order filed by Ninth Circuit denying Motion to Withdraw Mandate.

July 30, 1997--Order filed by Ninth Circuit for en banc consideration whether to recall mandate to consider whether the panel decision of Ninth Circuit would result in a fundamental miscarriage of justice.

Ju'y 31, 1997--Petition for Writ of Mandamus filed by Warden Calderon in United States Supreme Court.

July 31, 1997--Supplemental briefs regarding en banc review filed by the parties.

August 1, 1997--Order filed by United States Supreme Court denying Warden Calderon's Petition for Writ of Mandamus.

August 1, 1997--Oral argument before en banc Ninth Circuit.

August 3, 1997--Order recalling mandate, withdrawing opinion of three-judge panel, affirming partial grant of habeas relief, reversing partial denial of habeas relief, remanding for further proceedings in district court, and directing the state to vacate its order of execution is filed by Ninth Circuit.

August 3, 1997--Warden Calderon files Petition for Writ of Mandamus in United States Supreme Court.

August 4, 1997--Order regarding absence of majority of votes for full court rehearing en banc filed by Ninth Circuit.

August 4, 1997--Petition for Writ of Mandamus deemed Petition for Writ of Certiorari and petition granted.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE CENTRAL DISTRICT OF CALIFORNIA

THOMAS MARTIN THOMPSON, *Petitioner*

v.

ARTHUR CALDERON, *Respondent*

JUDGMENT
Filed March 29, 1995

IT IS HEREBY ADJUDGED that the first amended petition for writ of habeas corpus and the two subsequent amendments are GRANTED IN PART and DENIED IN PART. Specifically, the writ is GRANTED as to the rape charge and the rape special circumstances and DENIED in all other respects. Because the writ was granted on the only special circumstances present in this case, petitioner's death sentence is VACATED. The State has 60 days to retry petitioner on the rape charges or resentence petitioner in accordance with the Order and Opinion filed concurrent with this judgment.

IT IS SO ORDERED.

Dated: March 28, 1995

RICHARD A. GADBOIS, JR.,
United States District Judge

ORDER AND OPINION
GRANTING IN PART AND DENYING IN PART
THE PETITION FOR WRIT OF HABEAS CORPUS

[Caption Omitted in Printing]

I. INTRODUCTION

Petitioner, Thomas Martin Thompson, filed an initial petition for writ of habeas corpus in this Court on January 19, 1990. Petitioner has subsequently amended the petition three times. This Order discusses the first amended petition, filed May 31, 1991, and the three additional claims added in two subsequent amendments.

On November 4, 1983, an Orange County jury convicted petitioner of one count of first-degree murder and one count of forcible rape. The jury also found true the special circumstance of murder during the commission of a rape.[1] Two weeks later, the jury recommended that petitioner be sentenced to death. Nine months later, after a hearing on a motion for a new trial, petitioner was formally sentenced to death. Petitioner was represented at trial by attorney Ronald Brower. The prosecutor was Michael Jacobs.

Petitioner's petition for writ of habeas corpus challenges both his convictions and his sentence. Thompson presents 27 claims and numerous sub-claims of constitutional error. During the five years this case has been pending in this Court, the Court has read (and reread) the 3300 pages of trial transcripts of Thompson's trial, the 2600 pages of trial transcripts of co-defendant David Leitch's trial, both sets of clerk's transcripts, and the 1000's of pages of briefing and exhibits submitted by the

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1. Initially, Thompson was also charged with robbery and robbery special circumstances, but his motion for judgment of acquittal was granted after the prosecution presented its case-in-chief.

parties. In addition, the Court held a three-day evidentiary hearing in November 1993 focusing on five allegations of ineffective assistance of counsel.

For the reasons set forth in detail below, the Court GRANTS the writ as to the rape conviction and rape special circumstance on the basis of ineffective assistance of counsel, and DENIES the writ as to all other claims.

II. FACTS[2]

Sometime during the summer of 1981, Thompson became acquainted with a number of young adults living in the Laguna Beach area. Thompson eventually moved into a studio apartment with his codefendant, David Leitch. Shortly before Thompson moved in with Leitch, Ginger Fleischli moved out of Leitch's apartment and moved in with Leitch's ex-wife, Tracy. Leitch had been involved in an intermittent romantic relationship with Fleischli before and after his marriage to Tracy.

On the evening of September 11, 1981, Fleischli and Tracy met Thompson and Leitch at a restaurant on Balboa Island. The four later went to a bar in Laguna Beach. Eventually, Leitch and Tracy left, leaving Thompson and Fleischli together. The two of them met another acquaintance, Afshin Kashani, and danced and drank for several hours. In addition, Thompson and Kashani smoked hashish.

Sometime around 1:00 a.m., Thompson, Fleischli, and Kashani returned to Thompson's apartment. Thompson and Kashani smoked more hashish, while Fleischli went to a nearby liquor store. While Fleischli was gone, Thompson told Kashani

2. Because many of the allegations in the petition are heavily fact-based, the facts are set forth at length. In addition, more specific facts are provided where relevant throughout the Order.

that he would be leaving town the next week and he wanted Fleischli for the weekend. Thompson also told Kashani that he could have Fleischli after Thompson left town.

Kashani left the apartment before Fleischli returned. Kashani returned to the apartment a few minutes later to retrieve his cigarettes. He testified that Thompson appeared nervous and did not allow him to reenter the apartment, but instead passed him the cigarettes at the doorway.

The next morning, Tracy Leitch went to the Leitch/Thompson apartment and inquired about Fleischli who had not returned home the previous night. Thompson told her that Fleischli had left the bar with Kashani. Later that evening, Tracy saw Thompson at a party and again asked about Fleischli. In his answer, Thompson described Fleischli using the past tense. The next day, Tracy filed a missing person's report.

Fleischli's body was found the following day buried in dirt in a field behind a nursery in Irvine. Two footprints were found at the gravesite, one of which was consistent with shoes belonging to Leitch. Fleischli's body was wrapped in a sleeping bag and blanket that had been in the Leitch/Thompson apartment. Fibers from the blanket matched fibers found in the trunk of Leitch's car. Fibers on Fleischli's body matched fibers from the apartment carpet. Fleischli's blood was found on and under the carpet at the apartment.

Fleischli had five stab wounds to her head. She died from a stab wound through her ear that severed her carotid artery. When Fleischli's body was found, her head was wrapped with duct tape, two towels, a sheet, and her jacket. Her shirt and bra were cut and pulled down over her arms. Her jeans were zipped but not buttoned. She was not wearing underwear, socks, or shoes.

The day before Fleischli's body was found, Thompson and Leitch went to Mexico. Thompson was arrested in Cabo San Lucas on September 26, 1981. Following his arrest, Thompson told the police that he fell asleep before Fleischli returned to the apartment. Thompson also told the police he knew that Fleischli had been stabbed in the head, though that information had not yet been released to the public.

Two informants, Edward Fink and John Del Frate, testified that Thompson told them that he raped Fleischli and then killed her so she would not report him to the police. The pathologist who performed the autopsy testified that Fleischli did not have any vaginal bruising or lacerations, but did have bruising on her hands, wrists, ankle, and elbow that occurred at or near the time she was killed. A deputy sheriff testified that an injury to Fleischli's wrist was consistent with a crushing injury from a handcuff. Thompson had handcuffs in his possession when he was arrested.

Thompson's defense was that Leitch probably committed the murder. Contrary to the story he told the police after his arrest, Thompson testified that when Fleischli returned from the liquor store, they engaged in consensual sex. Afterwards, Thompson passed out as Fleischli was dressing in preparation for Leitch picking her up and driving her home. Thompson did not wake up until Tracy arrived the next morning. He went to Mexico with Leitch because Leitch told him that his mother would be delivering a boat to Cabo San Lucas.[3]

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3. Thompson and another witness, Tracy Obert, testified that Thompson was planning to procure a boat to sail to Southeast Asia to smuggle refugees or gold.

III. THE ISSUES[4]

A. THE RAPE AND RAPE SPECIAL CIRCUMSTANCES

Petitioner challenges his rape and rape special circumstance on several different grounds.

Issue B(1): Ineffective assistance of counsel for failing to investigate, present, and rebut forensic and medical evidence[5]

Facts from Transcripts

The prosecution called as a witness, Dr. Robert Richards, the pathologist who performed the autopsy of Fleischli. He testified that on external exam, he noted bruises on Fleischli's ankles, palms, and wrists. Richards described trauma to the right wrist as a crushing injury with surrounding bruising. That injury, Richards opined, was inflicted by something other than a hand because the injury reflected that something was crushed deep into the skin. The left wrist had a bruise that was caused from 15 minutes to three hours before death. A bruise on the right knee was caused approximately 18 to 20 hours before death. Richards estimated that all of the remaining bruises were caused at or near the time of death. He further opined that the bruises were caused by hands during heavy handling.

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4. The Court has grouped petitioner's claims by topic rather than addressing each claim sequentially, as presented in the petition.

5. In every instance where the Court discusses ineffective assistance of counsel, it is applying the well-known and well-utilized two-prong test set forth in Strickland v. Washington, 466 U.S. 692 (1984).

Richards found no vaginal tearing or bruising. He stated that vaginal bruising or tearing is not necessary for rape. Richards observed that sometimes you find it and sometimes you do not.

Brower pursued the vaginal tearing theme during cross-examination, but asked Dr. Richards no questions about the bruising Richards observed on Fleischli's body. Richards conceded that vaginal tearing or bruising is common in rape victims but is not necessary. Richards then said that it was as rare as hen's teeth for an erect penis to cause vaginal tearing and that something else has to penetrate the vagina to get tearing or bruising. Richards agreed with Brower that the finding of tearing or bruising lends credence to a claim of rape. He then restated that no tearing or bruising was found in Fleischli's vagina.

On redirect, Richards stated that when examining probable rape victims he also looks for bruising on other areas of the body that would indicate that force was used.

On recross, Richards testified that there was no anatomical evidence or any evidence whatsoever of rape at the time of the autopsy. He stated that sperm and semen analysis would provide further evidence of rape.[6]

The prosecutor recalled Richards later in his case-in-chief and asked him to define "no anatomical evidence" of rape. Richards testified that he meant just that; he saw no evidence of trauma. He further stated that establishing rape was a legal matter that was out of his hands.[7]

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6. A criminalist testified later that vaginal swabs taken from Fleischli were positive for sperm.

7. Brower did not cross-examine Richards after this very brief testimony.

At the conclusion of the guilt phase, the court instructed the jury that among the evidentiary factors to be considered in determining Thompson's guilt on the rape charge were "the presence of bruising and contusions to Ms. Fleischli's wrists, hands, and ankles" and "the cut on her wrist."

Petitioner's Argument

Petitioner argues that Brower failed to obtain and review a complete set of coroner's reports, forensic laboratory reports, and photographs prepared by the sheriff's department. In addition, Brower failed to retain or consult with a forensic pathologist regarding the alleged rape and the details of the death. Brower's investigator, Thomas Gleim, did contact a pathologist, Dr. Root, but Dr. Root never examined any of the reports, documents, or photographs related to the case, nor did he provide any consultation or testimony.

Facts from the Evidentiary Hearing

Dr. Root testified on Thompson's behalf at the evidentiary hearing held before this Court. Root had been contacted by Gleim in the fall of 1983, during petitioner's trial.[8] Root, however, never prepared a report, testified, or got paid.

After reviewing the materials set forth in Exhibits 27-29(EH), Root offered his opinions about bruising, cuts, and scars on Fleischli's body: The only injury seen to the lower

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8. After a brief telephone contact, Gleim sent Root a letter asking three questions: his opinion on the likelihood of rape occurring, whether there is some form of physical trauma associated with known rape cases, and what the likelihood was of a person lacking knowledge about human anatomy stabbing a person to death through the ear. [Exhibit B, Amended Petition] Gleim also sent Root copies of 16 documents involving the forensic evidence, including the autopsy report, but not including any autopsy or crime scene photographs. [Exhibit C, Amended Petition]

extremity was a 1½ inch scar on the left front ankle that was a minimum of weeks old. The lower right extremity had a 1¼ inch by 7/8 inch scar on the right lateral posterior side that was a minimum of weeks old. There was also a 1¼ inch scar on the right shin that was a minimum of weeks old. These scars were all noted in the coroner's report. There was also an injury below the right knee that the coroner noted was 11-24 hours old. Dr. Root, in sum, found no injuries to the lower extremities that occurred close to or at the time of death.

On the left upper extremity there was discoloration on the palm of the left hand, as well as the palm of the right hand. Dr. Root described that as livormortis or lividity, not as any injury. Dr. Richard's report did not mention any palm injury. On the left hand there was a contusion, but there was no cellular response so timing could not be done. It could have occurred at or near the time of death. There was also a contusion to the left wrist. The cellular response examined under a microscope led Root to conclude that the contusion was at least two days old. Thus, according to Root, the upper left extremity had only one injury that could have occurred at or near the time of death.

On the upper right extremity, there was a contusion on the right elbow, though Dr. Richard's report says there was no injury to the elbow. There was also an injury to the right wrist consisting of crushed skin and bruising to the surrounding area. There was no cellular response, so Root could not date the injury. It could have occurred at or near the time of death.

Other than the fatal injuries to the head, there were no other injuries, scars, or marks on Fleischli's body. Root agreed with Richards' observation in the autopsy report that there was remarkably little trauma to the body.

Dr. Root has seen on dead bodies injuries caused by handcuffs. The two most common injuries are indentations and discoloration from pressure from the cuffs, and scraping and

abrasions. The injuries to Fleischli's wrists were not consistent with any handcuff injuries seen by Root. He disagreed with Deputy Coder's testimony to the contrary.[9]

Root further opined that infrequent sperm found on the vaginal smear taken from Fleischli could be due to low sperm count, douching, or being up and about after intercourse, leading to drainage. The autopsy did not show any semen drainage in the exterior vaginal area or the thighs. Root also opined that if a woman had sex with a man who ejaculated inside of her and then she put on tight jeans, there would likely be semen drainage in the crotch of the jeans. The criminalist found no semen or sperm in the crotch of Fleischli's jeans.

Root testified that he holds his opinions to a reasonable degree of medical certainty and would have so testified if provided this information at the time of Thompson's trial.

Brower, in his testimony at the evidentiary hearing, stated that he planned to counter the medical evidence of rape by talking with the coroner, Dr. Richards, and finding out what evidence the prosecution had available for trial. On two occasions prior to petitioner's preliminary hearing, Brower met with Richards to discuss the medical evidence. As Brower recalls, Richards' evidence was favorable --he found no anatomical evidence of rape. Brower took this to mean no vaginal injuries, no bruises, and no cuts, but Brower did not question Richards about exactly what he meant.

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9. At trial, Deputy Coder, a law enforcement officer for 23 years, testified that he had seen injuries to wrists due to handcuffs. He then looked at a photograph of the injury to Fleischli's right wrist and stated that he had seen injuries similar to that caused by handcuffs hundreds of times. All of the injuries he observed were on live persons. On cross-examination, Coder admitted he had never studied handcuff injuries or seen handcuff injuries on a dead body.

Brower elected not to retain an independent pathologist because Richards' expected testimony was favorable and because Brower feared the prosecutor might learn of the consultation. Moreover, Brower felt no need to rebut the medical evidence of rape because his defense was that Thompson did not do it, not that there was no rape. Brower did not want to dwell on the bruising issue because it would signal the wrong emphasis to the jury.

Discussion

The state of California cannot execute petitioner if he murdered Fleischli, but did not rape her. See California Penal Code § 190.2. Indeed, in the absence of any special circumstances, petitioner would, at most, have received a sentence of 25 years to life with parole eligibility. See California Penal Code § 190. The defense of the special circumstances, therefore, had to be a critical part of Brower's defense strategy.

This Court finds that trial counsel's efforts in defense of the rape special circumstances were both constitutionally deficient and prejudicial to petitioner. While the failure to retain a defense pathologist in a case involving a rape allegation is certainly not per se unconstitutional, Brower's failure to do so under the circumstances of this case rises to the level of constitutionally deficient representation.

Brower suggested that he had no need to refute the rape evidence because his defense was that Leitch was the perpetrator. In other words, Brower did not aggressively rebut the rape and murder because Thompson did not do it. This "tactical" decision is flawed. Rebutting the rape presented no risk to the defense and could only aid Thompson. Thompson, as previously noted, was death penalty-eligible only because the jury found he committed the murder during the course of raping Fleischli. If Brower convinced the jury that a rape had not occurred, then Thompson could be convicted, at most, of

first-degree murder without special circumstances. Equally important, if Brower negated the rape, he would have cast considerable doubt on Thompson's role in the murder. The prosecution contended that Thompson killed Fleischli to prevent her from reporting the rape and interfering with his plans to go to Southeast Asia. Without the rape theory, Thompson had no obvious motive to kill Fleischli. Leitch, on the other hand, had plenty of motive.[10]

Brower further stated that he did not retain an independent pathologist because he feared that the prosecution would learn of the consultation. Then, if the defense later failed to call a pathologist to testify, the prosecution would know that the defense had obtained an unfavorable opinion. The Court finds this justification inherently incredible; it flies in the face of California law and common sense. California Penal Code § 987.9 insures confidentiality for consultation requests in capital cases. Prosecutorial violation of this statute would seemingly invite a bar to the prosecution's use of such information. Moreover, the possibility of a break in confidentiality is relatively small for consultation with a pathologist because a pathologist would not need to visit the client or have other involvement that would lead him to cross paths with any persons with connections to the prosecution.

In short, Brower had no valid tactical reason for not attacking the rape evidence. His lack of attention to this aspect of the defense is highlighted by his cursory and incomplete attempt to consult a pathologist.[11] Moreover, his failure to rebut the evidence was prejudicial. Petitioner has demonstrated

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10. Motive, of course, is not an element that must be proven. Nevertheless, the absence of motive would make it more difficult to convince the jury that Thompson, rather than Leitch, was the perpetrator.

11. Brower never had any direct contact with Root. Gleim apparently spoke with Root twice, but never discussed anything other than the questions posed by Gleim in his letter to Root.

to the Court that the accuracy of Dr. Richards' findings regarding the bruising was open to question. Brower not only failed to consult with a pathologist to rebut the prosecution's theory that Fleischli was bound hand and foot during the rape, but he also failed to cross-examine Dr. Richards about his testimony about bruising. The coroner's records provided fertile ground for challenging the accuracy of Richards' testimony. [See Exhibits J-M of the amended petition.][12/] Furthermore, the testimony about bruising has been seriously challenged by Dr. Root, the same pathology expert who would have and could have testified on petitioner's behalf at trial had Brower followed through on preparing a rape defense.

The evidence of rape was not substantial (see Claim L, below). Accordingly, any evidence that would negate the theory that a rape occurred would be of considerable value to the defense. When Brower's shortcomings regarding the forensic evidence are combined with his failure to gather and use impeaching evidence against the informants (see claims B(10) and Y, below), this Court concludes that Brower provided ineffective assistance of counsel with respect to the rape charge and the rape special circumstance.

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12. Brower's failure to bring to the jury's attention the fact that no semen drainage was found in the crotch of Fleischli's jeans is further evidence of Brower's inattentiveness to the rape charge. Brower's explanation that he did not bring this evidence to the attention of the jury to prevent the prosecution from explaining it away did not ring true. The Court questions how the jury would otherwise learn of this potentially probative evidence if not raised by counsel.

Issue B(10): Ineffective assistance of counsel for failing to adequately investigate and present evidence necessary to impeach Edward Fink

Facts from Transcripts

Jailhouse informant Edward Fink testified that he and Thompson were housed in the same module at the jail for one month.[13/] During that time, Thompson approached him on several occasions and told him about his crime. Thompson told him that on the night of the murder he was out with a female friend drinking and dancing. Later, the two returned to the apartment Thompson shared with Leitch. Thompson said he "wanted to screw her," but she refused because she was Leitch's girlfriend. Thompson then "took it." Afterwards, Thompson did not want any witnesses so he killed her "in a quiet way, like in the jungle." Thompson wrapped the dead woman in blankets and a sleeping bag belonging to Leitch and waited for Leitch to return home. When Leitch returned, Thompson told him that he had lots of gold in Mexico and Thailand and that the two of them could go to Mexico and live well and Leitch could get his kid back. In exchange, Leitch had to help Thompson dispose of Fleischli's body because Thompson did not have a way to do so.

Fink said that the reason he came forward with the information was that he was talking to some investigators about something else and was curious about what was happening with Thompson. The investigators asked if he knew anything and Fink told them. Fink was curious about Thompson because he told inmates that he was a mercenary and had fought in the jungle. Also, Fink said the facts of the case upset him.

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13. Prior to Fink's testimony, the trial judge held a 402 hearing at Brower's request to determine Fink's reliability. The judge subsequently allowed Fink to testify.

Fink told the jury that he was released shortly after giving a statement to the investigators, but that he was currently in jail on a parole violation. The only thing Fink asked for in return for his testimony was to serve his remaining 29 days in Chino. Fink admitted that he had four prior felony convictions (grand theft, two petty theft with priors, and possession of marijuana for sale).

On cross-examination, Fink explained that he had two conversations with law enforcement about Thompson's case. The first conversation took place in 1981. Fink talked with two sheriffs' investigators who taped the conversation. The second conversation, a week before his testimony, included Jacobs and a district attorney investigator. At the meeting with Jacobs, Fink read parts of a transcript of his taped meeting. Fink looked over the transcript at the trial and stated that he thought it was accurate. Fink stated that he never asked Thompson any questions, he just let Thompson talk.

Fink looked at his rap sheet and said it was accurate except that it left off his last felony conviction. Also, Fink said he did not use all 14 aliases listed on his rap sheet. Fink admitted to using some aliases when he was arrested, but noted that he was usually arrested in Long Beach and he was known in Long Beach so he could not lie about his identity. Fink agreed that he could have used some of the other aliases, but did not recall doing so. In total, Fink estimated he had spent 14 years in penal institutions.

After a second 402 hearing, the judge allowed Brower to inquire about Fink's drug history. Fink admitted that he used illegal drugs. He began using marijuana at age 15 and later began using barbiturates. He used these drugs on a daily basis in high school. Starting at age 18 and continuing until the time of trial, Fink used heroin. Fink, who was 33 at the time of the trial, testified that at his peak at age 23, he was shooting heroin four times per day. At the time Fink gave his statement to the

sheriffs, he was using heroin once per week. His drug usage continued during his incarcerations.

Fink said it was possible he discussed Thompson's case with other inmates but he did not believe that he had done so. Fink admitted that he had snitched on other inmates and was known as an informant. When asked for specifics, Fink said he informed on a prison gang (the Aryan Brotherhood), Bobby McGee, and another inmate whose name Fink could not recall. He reluctantly agreed that he was in protective custody with Thompson because he was an informant. He testified that he became an informant because the Aryan Brotherhood wanted to kill him because he would not kill for the gang. Fink believed that if he did not get into protective custody he would be killed, so he snitched to get protective custody. Fink said he informed on McGee because McGee killed a girl. However, he stressed that the police came to him for information, he did not approach them. Fink testified that child molesters and baby killers offend him, but cop killers do not offend him.

Fink restated that he asked the prosecutor for one favor --to be housed in Chino for the remaining 29 days of his sentence.

Fink could not explain why he said in his first statement that Thompson said the murder took place at a house, yet testified that Thompson said an apartment. Fink stated that he had not read a newspaper at the time he made the first statement because he was too busy using dope. Fink could not explain what he meant when he told the initial investigators that people came up to him in jail all the time and talked about their crimes.

Fink testified that his ability to recall or recollect events is not impaired when he is using heroin. He clarified this to mean that his brain was not affected, but that when he is using he just does not care about things so he has no need to remember.

Fink opined that his 15 year heroin addiction had not affected his brain or his ability to think. Fink denied being a heroin addict. He stated he takes heroin once a week because it gives him something to do.

On redirect, Fink said he had not used heroin on any of the days that Thompson talked to him. On recross, Fink said the reason he told the truth was because he did not like Thompson.

Evidence that Brower could have obtained about Fink[14]

Informing Activity

(1) In 1973, Fink testified against Jimmy Biaz in a Los Angeles sale of heroin case.
(2) In 1976 or 1977, Fink informed against and testified against Dizzy Dean and a man named Brown in a Los Angeles possession of a sawed-off shotgun case.

(3) In 1979, Fink informed against Thomas Goldstein in a Long Beach murder case and testified against Goldstein in 1980.[15]

(4) In 1979, Fink informed against Terry Whitaker and Tim Colvin in a Los Angeles murder case and testified against Whitaker in December 1979.

(5) In 1980, Fink informed against Rocky Glover in a Los Angeles murder case.

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14. These facts are supported by evidence and, with limited exception, are conceded by respondent.

15. At Goldstein's trial, Fink admitted providing information to Long Beach police officers on at least five occasions. Fink also acknowledged that when he informs, he is never told out front that he will get something for helping, but that he has asked for and received help. See EH Exhibit 11 (transcript of Fink's testimony at Goldstein's trial).

(6) In 1982, Fink informed against Ron Graham in an Orange County murder case.

Law Enforcement Favors

(1) At Fink's request, Officer Chastain of the Long Beach Police Department put in a good word for Fink on Fink's 1973 possession of heroin for sale charge and appeared in court on two of Fink's probation violation cases.

(2) In 1977, Fink asked Long Beach police officers once or twice to help on his pending criminal case.

(3) In 1979, a Long Beach police officer wrote to the Los Angeles District Attorney's Office requesting that Fink be given county jail time for a pending grand theft charge because Fink was going to be a witness in a homicide case. Fink eventually pled guilty in exchange for one year of county jail time.

(4) In 1980, Fink told a Los Angeles probation officer that a petty theft warrant from Orange County should have been dropped due to Fink's testimony in a murder trial.

(5) In 1982, a Long Beach police officer contacted the Los Angeles District Attorney's Office on Fink's behalf concerning pending criminal charges.

(6) In 1982, a probation officer wrote to a judge that he had learned that Fink had been most helpful in ongoing murder investigations. Later that week, Fink was sentenced to two years probation and one year of county jail time for a felony petty theft with a prior conviction.

(7) In 1982, a homicide captain wrote a letter to Fink's parole agent commending Fink for extraordinary behavior assisting the department. As a result, Fink's parole revocation was reduced three months.

(8) In May 1983, a Los Angeles sheriff contacted the Los Angeles District Attorney's Office requesting that Fink be given only one year of county jail time for a pending petty theft with a prior charge because Fink assisted with a murder case. As a result, Fink's charge was reduced to a misdemeanor and Fink was sentenced to one year of county jail time. The same day, Fink was also cleared of two burglary charges because he received a prison sentence on the other charge.

Favors from Thompson's prosecutor

(1) In August 1984, after Fink testified in Thompson's case, Jacobs wrote a letter to the Board of Prison Terms stating that Fink's testimony was a crucial part of the prosecution's case and requesting that Fink be released from custody on a parole violation prior to Christmas.

(2) In September 1984, Jacobs testified favorably for Fink at Fink's parole revocation hearing.

Other information

(1) When Fink was arrested in November 1981 for a parole violation, he lied to the arresting officers about his name and his birthdate. Fink also gave the wrong birthdate to the investigating officers in the Thompson case when they first interviewed him. Fink also lied at petitioner's trial when he testified that he never used his brother's name as an alias.

(2) Shortly after his November 1981 arrest, Fink contacted Huntington Beach police to inform that Terry Cosgrove had confessed a murder to him while he was in prison in Chino earlier in 1981.

(3) In December 1981, Fink informed against Thompson. The same day Fink informed on petitioner, he listed a Thompson investigating officer and an Orange County sheriff's investigator

as friendly witnesses for his parole violation hearing. Eight days later, Fink was released from custody without a hearing. Fink did not appear for his parole violation hearing rescheduled for January 1982 and a warrant was issued for his arrest.

(4) Fink was arrested again in February 1982. That same day, Fink contacted Long Beach police about Ron Graham confessing to a murder. While in the custody of a Long Beach police officer to discuss the murder, Fink used a ruse to escape.

Fink's Reputation for honesty

(1) In 1980, Fink's probation officer described Fink as a confidence artist who steals with premeditation from his victims assuming they will not complain to the police.

(2) In 1981, the California Department of Corrections described Fink as "a con man who tends to handle facts as though they were elastic [and] can talk total strangers out of their money with little effort on his part."

(3) Prior to Thompson's trial, the Orange County Sheriff's Office and Orange County District Attorney's Office considered Fink an "unreliable operator."

Petitioner's Argument

Brower failed to obtain Fink's criminal and informant history and thus did not impeach Fink's testimony with the above information. All of the information discussed above was available from the applicable courts, law enforcement agencies, or correctional agencies as evidenced by attorney Joel Baruch's ability to compile much of this information directly from the sources and without reliance on information compiled by the Los Angeles District Attorney's jailhouse informant investigation.

Thompson argues that contrary to Brower's testimony at the evidentiary hearing, Brower never obtained any of this information. And, even if Brower had obtained it, he was constitutionally ineffective for not using it to impeach Fink at trial. Had Brower presented this evidence, he would have destroyed Fink's credibility, rebutted the prosecutor's argument that Fink had no motive for testifying falsely against Thompson and was not receiving any personal benefit for testifying, and rendered Fink's testimony useless.

Discussion

The cross-examination of Fink that Brower did put on was thoroughly presented. The error, however, lies in what Brower did not do. He utterly failed to discover and use the most devastating of information --Fink's previous, extensive history of informing and receiving favors. This was not a case where the informants' testimony was cumulative to other evidence strongly tying the defendant to the crime.[16] Instead, the testimony offered by the informants, both Fink and Del Frate, was critical to Thompson's conviction for rape and the rape special circumstance. Brower, therefore, had a professional obligation to use all available information to establish Fink's lack of credibility.

Respondent concedes almost of all of the background evidence on Fink. Respondent's primary argument is that the information was not readily available to Brower. The testimony of Joel Baruch at the evidentiary hearing lays this argument to rest. In 1988, Baruch defended a murder case where Fink was a crucial prosecution witness. In preparation for that case, Baruch obtained numerous documents supporting Fink's lack of credibility. [See Exhibits 1-25, EH] Respondent has not

16. Even the California Supreme Court found the prosecution's need to rely on the testimony Fink and Del Frate to be "disconcerting." People v. Thompson, 45 Cal.3d 86, 143, 246 Cal.Rptr. 245 (1988).

presented any evidence to rebut petitioner's argument that documents available to Baruch in 1988 were available to Brower in 1981-1982.[17]

Brower had two responses to questions about his preparation for the informant testimony at trial. First, Brower maintained that he and his investigator conducted a fairly thorough investigation into many facets of the informants' lives. Second, Brower explained that for tactical reasons he decided not to use all of the information he had uncovered about the informants. Neither explanation rang true.

At the evidentiary hearing, Brower testified contrary to his previous deposition testimony concerning his pretrial investigation of the informants. For example, at the evidentiary hearing, Brower testified that he had his investigator, Dennis Moses, seek information on the informants from police agencies that had previously arrested Fink and Del Frate because Moses had a law enforcement background. At his earlier deposition, Brower testified that he does not send investigators to talk to law enforcement agencies because those agencies never cooperate with the defense. [Brower Depo, p. 245, 263] In addition, at his deposition, Brower had very little recollection of what tasks he did or had done to investigate the informants. By the time of the evidentiary hearing, however, Brower had "remembered" many details regarding his level of investigation.[18]

Brower's explanation for these inconsistencies --the time he has had to refresh his recollections since the deposition-- lacks

17. Notwithstanding respondent's argument, Brower has never actually claimed that he tried to find impeaching evidence, but the evidence was unavailable. Brower's primary argument is that he had enough impeaching material and did need additional support.

18. The Court notes that the depositions of Moses and Gleim also do not support Brower's testimony about the investigation of the informants.

credibility. Neither Brower nor respondent submitted any evidence supporting Brower's testimony that he had his investigators explore the background of the informants. Without such evidence, the Court questions how Brower was able to refresh his memory since the taking of his deposition.

Similarly, Brower's asserted reliance of non-verbal cues --the judge making a throat-slashing gesture with his finger, the jurors looking bored and rolling their eyes, and the prosecutor looking down-- to decide that he had thoroughly discredited Fink and should cease cross-examination defies common-sense.

Certainly the failure to exhaustively investigate the background of informants and to use that information at trial is not always ineffective assistance of counsel. The circumstances of this case, however, compelled a significantly better effort by counsel. Brower did not take the steps necessary to ensure that the jury had an adequate basis for judging Fink's credibility. In the absence of other compelling evidence that Thompson raped Fleischli, Brower's dereliction in not presenting critical evidence going towards Fink's credibility was constitutionally ineffective.

Moreover, that omission was prejudicial. Based on the above discussion, this Court has extreme doubts as to the veracity of Fink's testimony. There is surely a reasonable probability that had the jury learned the full extent of Fink's informant background, the jury would have disregarded his testimony. Without Fink's testimony about rape, and considering the problems associated with the physical evidence of rape (see claim B(1), above) and Brower's investigation of Del Frate (see claim Y, below), there is a reasonable probability that Thompson would not have been convicted of rape or the rape special circumstances and would not have been eligible for the death penalty.

For these reasons, the Court finds that Brower's minimal defense of the rape charges --both the forensic evidence and the

informants-- violated petitioner's Sixth Amendment right to the effective assistance of counsel.[19] Petitioner is entitled to a new trial on the rape charge and the rape special circumstance.

Issue Y: Ineffective Assistance of Counsel for failing to investigate and impeach the testimony of prosecution witness Del Frate

Facts from Transcripts

Jail house informant John Del Frate testified that he and Thompson were housed near each other in protective custody in September and October 1982. At one point, Thompson approached Del Frate about Del Frate finding a witness who would implicate Leitch in Fleischli's murder. Thompson wanted Del Frate, who was scheduled for release soon, to find someone who would testify that he or she overheard Leitch calling his father from the Hotel Laguna and telling him that he committed the murder but he left incriminating evidence to make it look like Thompson did it. In the same conversation, Thompson asked Del Frate to make it look like an attempt was made on Tracy Leitch's life. Thompson thought this would scare Tracy away from protecting Leitch.

In a subsequent conversation, Del Frate claimed that Thompson provided him the details of the murder. According to Del Frate, Thompson told the following story: Thompson, a woman named Ginger, and a man named Shawn[20] went to

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19. When considering an ineffective assistance of counsel claim, prejudice may be found "where counsel's multiple deficiencies have the cumulative effect of denying a fair trial." Ewing v. Williams, 596 F.2d 391, 396 (9th Cir. 1979). While Ewing predates the Court's decision in Strickland, the Ninth Circuit continues to consider the cumulative effect of trial counsel's errors. See Wade v. Calderon, 29 F.3d 1312, 1323 (9th Cir. 1994) (applying Ewing).

20. Afshin Kashani went by the name "Shawn."

some nightclubs in Laguna Beach and then went to Leitch's apartment. Ginger left to go to a liquor store. While Ginger was gone, Thompson asked Shawn to leave because he wanted to make it with Ginger. Shawn left, though he came back briefly. Ginger returned and Thompson forced himself on her. Before raping her, Thompson was playing with Leitch's skin diving knife, but he did not threaten her with the knife. After the rape, Ginger was upset. She cried and said she was going to tell Tracy Leitch. Thompson stabbed her so she would not tell anybody. Thompson said he used a scuba knife and stabbed Ginger in the side of the head. Leitch was not present. After Leitch returned, they wrapped the body in a sleeping bag and buried it in a shallow grave. Thompson and Leitch returned to the apartment to clean things up.

Del Frate testified that on an earlier occasion Thompson told him that Leitch committed the murder by stabbing Ginger in the upper torso. Thompson also said that if he was lucky, the scuba knife was on its way to Hawaii.

Del Frate recalled a later conversation with Thompson after Leitch was released on bail. Thompson asked Del Frate if he would murder Leitch. According to Del Frate, Thompson believed that if Leitch disappeared it would look like Leitch was guilty. Thompson told Del Frate to get Leitch from his mother's house, kill him, drive him out to the desert, bury him, and then set the car on fire at another location. Thompson gave Del Frate the names of two women who would help him out financially. Thompson also told Del Frate to use an alias and to stay at the Sixpence Inn in Tustin so Thompson could contact him.

Del Frate admitted that he was facing extradition from Ohio to face felony charges (armed robbery, felonious pointing of a gun, and escape) in Oklahoma. In addition, Del Frate was facing robbery charges in Santa Cruz. Del Frate previously served time for second degree murder and credit card forgery.

Del Frate denied asking for any favors in exchange for his testimony at petitioner's trial. He said he gave a statement in this case before any of the other criminal charges arose. Del Frate said he was not asking for any assistance with his pending cases.

On cross-examination, Del Frate provided further details of his prior convictions. He also testified that he escaped from Oklahoma because he was going to receive a 350 year sentence. After he escaped, the sheriff threatened to kill him.

Del Frate said he reviewed the transcripts of his two previous interviews the morning before trial. He agreed that the transcripts were an accurate transcription of the interviews. He also agreed that at the end of each interview, he was asked if he had anything to add. Brower then asked him why his statements that Thompson stabbed Ginger in the head and forced himself on Ginger, as well as his description of how Thompson wanted to make it look like an attempt was made on Tracy's life, and Thompson's statement about the knife being on its way to Hawaii did not appear in the transcripts. Del Frate responded that there were a lot of conversations over a period of a few months and that the interviewer[21] did not ask about some topics. He later added that some of the information slipped his mind during the interviews.

Upon further clarification, it was revealed that Del Frate said in the interview that Ginger was stabbed once in the head or the side of the neck and in the chest or upper torso. Del Frate explained that Thompson told him several stories including that he stabbed Ginger several times in the head and that Leitch stabbed Ginger in the chest.

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21. Del Frate was originally interviewed by Deputy District Attorney Brice, the original prosecutor. After the preliminary hearing, Brice was appointed to the bench and Jacobs took over the Thompson and Leitch cases.

Brower asked Del Frate why he said that Thompson had sex with Ginger the night before the night she was killed. Del Frate said his speech pattern was misunderstood and he really meant to say they had sex the night she was killed.

Del Frate conceded that the interviews were friendly and that he was given plenty of time to answer questions. He also opined that his memory was better at the trial then it was at the time of the interviews because he has had time to think about it. Brower asked why Del Frate said that Thompson said he stabbed them not her. Del Frate responded that it was another speech pattern problem and he meant to say he stabbed her.

Del Frate testified that during the time Thompson confessed to him another murderer also confessed to him. He admitted that nobody prior to or subsequent to that time ever confessed to him. He described two confessions at the same time as a coincidence.

Del Frate said he never mentioned the part about the knife being on the way to Hawaii because he was only asked in the interview to describe the knife.

Later in the trial, the prosecutor recalled Del Frate to testify about two notes that Thompson wrote to him between the time of the two interviews. One note contained the identities Del Frate was to assume when he was released and he contacted Thompson's girlfriends. The second note contained a description of the clothes the "witness" was to say that Leitch was wearing when the witness overheard Leitch's phone call.

Evidence that Brower could have obtained about Del Frate[22]

Informing Activity

At his 1978 murder trial, Del Frate testified that he had been a police informant since the age of 14; had acted as an informant for the Canton, Ohio police department, the DEA, the Justice Department, and the San Mateo sheriff's office; he acted as an informant for drug sales to avoid arrest and prosecution for his criminal activity and to receive money and other benefits; he contacted numerous law enforcement agencies he had informed to after being arrested for murder.

Reputation for dishonesty

(1) Prior to Thompson's trial, both the Canton police and the San Mateo sheriffs notified the California Department of Corrections that they considered Del Frate an unreliable informant.

(2) About two months after Thompson's trial, Del Frate's father and brother described him as a pathological liar who lied persistently since childhood.

(3) Del Frate was hospitalized in a state mental hospital for several months in 1972 and diagnosed as schizophrenic with antisocial tendencies.

Del Frate's criminal record

(1) In addition to the prior convictions he admitted at Thompson's trial, Del Frate had a 1977 felony conviction in California for grand theft and two 1975 felony convictions in Ohio for sale of hallucinogens without a license.

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22. These facts are supported by evidence and are not contested by respondent.

(2) In addition to the pending charges Del Frate admitted at Thompson's trial, he was also wanted for additional charges in California and Oklahoma.

Petitioner's Argument

Trial counsel committed a number of errors regarding Del Frate's testimony. First, Brower failed to challenge Del Frate when he testified that he had only two felony convictions. Second, Brower failed to challenge Del Frate's testimony about crimes for which he was facing prosecution. Third, Brower failed to learn that Del Frate's father and brother considered him a pathological liar who had lied consistently since childhood. Fourth, Brower failed to learn that Del Frate had been housed with Leitch for several weeks prior to his contacts with petitioner. Fifth, Brower failed to introduce newspaper articles containing the same factual errors made by Del Frate in his testimony.

All of the evidence that Thompson has now discovered about Del Frate was readily available from various sources at the time of Thompson's trial.

Brower's testimony that he and his investigator extensively investigated the informants is not supported by his conduct at trial, his deposition testimony, the declarations and deposition testimony of his investigators, or his files.

Discussion

With one big exception, the evidence about Del Frate's background that was available but not utilized by Brower was largely cumulative and immaterial. Brower erred, however, in failing to locate and use Del Frate's 1978 testimony about his informant history. Obtaining Del Frate's trial testimony would have aided Brower in his effort to discredit Del Frate. When confronted with this testimony, Del Frate would either have had

to admit to a substantial history of informing or admit that he perjured himself at a previous trial. In either case, Del Frate's testimony could only reflect poorly on his credibility. The Court does not view this omission as an independent Sixth Amendment violation, however, because petitioner cannot satisfy the prejudice prong. Nevertheless, tne omission adds to the cumulative impact of Brower's ineffectiveness in defending against the rape charge.

Petitioner's remaining arguments involving Del Frate are without merit. For example, Thompson argues that Brower could have impeached Del Frate by showing that he had five prior felony convictions rather than two. This, Thompson contends, would have shown that Del Frate lied about his prior convictions. It would also further impugn Del Frate's credibility since he would be a five-time felon rather than a two-time felon. Thompson, however, is wrong on both counts.

First, Del Frate was never asked by either attorney how many priors he had. The prosecutor asked Del Frate two leading questions about a second-degree murder conviction and a credit card forgery, to which Del Frate agreed. Similarly, Brower asked Del Frate about the murder and forgery convictions only. Thus, Thompson cannot show that Del Frate lied because Del Frate never testified that he had only two prior felony convictions. Second, it would be hard to argue that the jury would find Del Frate credible knowing he had a conviction for murder and a conviction for forgery, but would find him less credible if they knew that he also had three other felony convictions.

Thompson's argument that Del Frate had more criminal charges and investigations pending then was discussed at trial is similarly unavailing. As with the prior convictions testimony, Del Frate was never asked a direct question about his pending charges. The prosecutor did not ask Del Frate what charges he was facing, but rather asked leading questions such as are you

wanted for X and Y in Oklahoma. Accordingly, Del Frate's testimony on direct cannot be termed false. Likewise, when Brower attempted to question Del Frate about the number of crimes for which he was wanted, the trial court sustained the prosecutor's repeated objections on relevancy grounds. Thus, the issue of whether Brower knew or should have known about other warrants is irrelevant since the court would not allow Brower to question Del Frate on that issue.[23]

Thompson suggests that Brower's failure to call Del Frate's family to testify about Del Frate's long history of lying warrants habeas relief. While such testimony might have supported, minimally, Brower's contention that Del Frate was a liar, the absence of such testimony, especially given the strong cross-examination and argument by Brower, cannot be deemed prejudicial. The Court also questions both the availability and the admissibility of such testimony. California law allows testimony about someone's reputation for honesty in the community, not someone's reputation in his family residing in another state. See California Evidence Code § 1324.

Finally, Thompson's 1993 declaration from Leitch that he and Del Frate shared a cell 12 years previously does not convince the Court that the two were indeed cellmates. And even if they were cellmates, Thompson does not allege that Del Frate learned any facts about the case from Leitch or that he received any benefits or threats from Leitch. The possibility that the jury would have inferred that Leitch passed information to Del Frate is not enough to warrant relief on this claim.

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23. At the time of Thompson's trial, California Evidence Code § 787 allowed impeachment by felony convictions, not by evidence of unadjudicated criminal acts.

Issue L: Insufficient evidence of rape

Petitioner's Argument

Petitioner maintains that the evidence presented at trial was constitutionally insufficient to support his rape conviction and rape special circumstance.

Discussion

In reviewing an insufficiency of the evidence claim brought by a state prisoner, a federal court must ask "whether, after viewing the evidence in the light most favorable to the prosecution, any trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 307, 319 (1979) (emphasis in original). The standard is not whether this Court believes that the evidence was established beyond a reasonable doubt, but ruther whether any trier of fact could so hold. Id.

In applying this standard, this Court must explicitly refer "to the substantive elements of the criminal offense as defined by state law." Id. at 324, n.16. The information in this case charged petitioner with rape under California Penal Code § 261(2), which states: "Rape is an act of sexual intercourse accomplished with a person not the spouse of the perpetrator, under the following circumstances: (2) Where it is accomplished against a person's will by means of force, violence, or fear of immediate and unlawful bodily injury on the person of another."

While the evidence that petitioner raped Fleischli was far from overwhelming, the evidence that was presented, if credited by the jury, satisfies the elements of rape beyond a reasonable doubt. Petitioner, by his own admission, had sexual intercourse with Fleischli the night she was murdered. Fleischli was not petitioner's spouse. The prosecution presented evidence that the intercourse was against Fleischli's will and accompanied by

force, violence, or fear of immediate injury: bruising and contusions to Fleischli's wrist, hand, and ankles suffered at or near the time of death, a crushing injury to Fleischli's wrist likely caused by handcuffs, petitioner's possession of handcuffs at the time of his arrest, petitioner's initial denial that he had intercourse with Fleischli, Fleischli's bra and blouse being cut open and pulled down around her arms thus binding them, the button to Fleischli's jeans being open, the absence of Fleischli's underwear, socks, and shoes, the testimony of Fink that petitioner told him that he "took it" after Fleischli refused to have sex with him, and the testimony of Del Frate that petitioner told him that he forced himself upon Fleischli.

As discussed previously in this Order, the Court believes that much of this evidence may not have been credible. Nevertheless, viewing the evidence in the light most favorable to the prosecution, the Court finds that a reasonable trier of fact could have found the elements of rape beyond a reasonable doubt.

Issue N: Denial of motion under Penal Code 995 to set aside rape charge and rape special circumstance

Petitioner's Argument

Following the preliminary hearing, the court found insufficient evidence to hold Thompson on the rape and rape special circumstance charges. Nevertheless, the rape charges were included in the information filed by the prosecution in superior court. Thompson moved under California Penal Code § 995 to set aside the rape charges because he was held to answer without probable cause. The motion was denied without explanation. The court's erroneous ruling coupled with Thompson's subsequent trial and convictions violated his right to due process.

Facts from the Transcripts

At the conclusion of the preliminary hearing, on July 12, 1982, Municipal Court Judge Samuel Taylor stated, "I agree with the Defense as to Count 2 [the rape charge]. I don't think there's any sufficient evidence to bind over on Count 2 or on the special circumstances alleged based on Count 2." [CT III/1249] That was the extent of the court's ruling on the insufficiency of the evidence supporting rape.

Eleven days later, the prosecution filed an information in superior court that included one count of rape and an allegation of rape special circumstance. [CT III/1253-1254]

On January 12, 1983, Brower filed a motion pursuant to § 955 seeking, among other things, dismissal of the charges of rape and rape special circumstances due to "lack of reasonable and probable cause." [CT IV/1361-1362] Brower's argument was one page in length.

The court denied Brower's § 995 motion on February 18, 1983 without explanation. [CT IV/1416]

Discussion

Following a preliminary hearing and commitment, a prosecutor has 15 days to file an information against the defendant in superior court. See California Penal Code § 739. The information may include offenses that were not named in the commitment order but that were shown by the evidence at the preliminary hearing to have been committed. Id. The prosecutor cannot, however, add an offense to the information if doing so runs counter to factual findings made by the magistrate at the preliminary hearing. Pizano v. Superior Court of Tulare County, 21 Cal.3d 128, 133 (1978) (emphasis in original). On the other hand, if the magistrate accepts the evidence and reaches a legal conclusion that the evidence does not provide

probable cause, that conclusion can be challenged by adding the offense to the information. Id. (emphasis in original).

In this case, the magistrate at petitioner's preliminary hearing made no factual findings regarding the rape and rape special circumstances; he merely reached a legal conclusion. The prosecution, therefore, was permitted under state law to include the rape charges in the information. Petitioner raises no constitutional challenge to this process. Instead, he claims error with the trial court's denial of his § 995 claim. Federal habeas corpus relief is not available for violations of state law. Estelle v. McGuire, 502 U.S. 62, 116 L.Ed.2d 385, 396 (1991). "A mere error of state law is not a denial of due process." Engle v. Isaac, 456 U.S. 107, 121 n.21 (1982). At worst, the trial court violated state law in denying petitioner's § 995 motion. That error, if it is even present, will not be considered by this Court.

B. REMAINING INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS

(2) Failure to adequately cross-examine Tracy Leitch

a) Brower did not immediately confront Tracy with her perjury

Facts from the Transcripts

At the end of the prosecutor's direct examination and over defense objections, Leitch's ex-wife, Tracy, testified that on the evening of the murder, Fleischli said to her, "Do you think Tom would kill me?" Following this highly prejudicial testimony, Brower asked to defer cross-examination for five days.[24/]

24. Brower had also requested to defer the cross-examination of the previous witness, Tracy Obert. The court granted both requests.

Sometime after Tracy's testimony, the parties and the court learned that her testimony about what Fleischli said the night of the murder was a lie. During cross-examination eleven days after Tracy's initial testimony, Brower questioned Tracy about Fleischli's purported statement. Tracy refused to answer citing her Fifth Amendment rights.[25/] After the court ordered her to answer, Tracy admitted that she told Leitch in a conversation taped at the Orange County Jail that she lied to the detectives and that what Fleischli had really said was "Do you think David would have Tom kill me?" She also admitted that she purposefully omitted any reference to Leitch when she recounted Fleischli's statement to the investigator. Tracy said she did not lie to the jury the first time she testified. Instead, she claimed she forgot about Fleischli's reference to Leitch. She further explained that since Leitch was not on trial, she did not think the reference was relevant.

Petitioner's Argument

Petitioner notes that the sheriff's department tape-recorded Leitch's conversations in jail, including conversations Leitch had with Tracy. Brower had these tapes available to him prior to Tracy's original testimony, yet failed to discover immediately that Tracy perjured herself. Because of this failure, Brower was not prepared to cross-examine her and to confront her with her perjury. Instead, Brower reserved his cross-examination and did not cross-examine Tracy for eleven days.

Discussion

The transcripts establish to the Court's satisfaction that Brower was not aware of the perjury at the time it occurred. Nevertheless, Thompson was not prejudiced by Brower's delayed realization because the jury did learn that Tracy lied on direct

25. The trial court appointed counsel for Tracy prior to her cross-examination.

examination. While Brower's efforts in exposing the perjury were less than stellar, his actions did not violate Thompson's right to the effective assistance of counsel.

b) Brower did not elicit favorable testimony from Tracy

Petitioner's Argument

Thompson contends that even with eleven days preparation, Brower's cross-examination of Tracy was inadequate. Brower failed to question Tracy about Fleischli's demeanor when she made the statement about fearing Thompson/Leitch and failed to elicit Tracy's belief that Fleischli would have "gone for sex" with Thompson.

Discussion

Brower discredited Tracy on cross-examination by exposing her as a perjurer. Therefore, he cannot fairly be faulted for failing to elicit favorable testimony from her. Moreover, eliciting the testimony suggested by Thompson would have opened the door to unfavorable information that was contained in the same tape-recorded conversation between Tracy and Leitch that also contained favorable information.

(3) Failure to adequately investigate and prepare for the cross-examination of Afshin Kashani

Facts from the Transcripts

Afshin Kashani spent part of the evening of the murder with Thompson and Fleischli. The three of them went dancing and drinking before going to Thompson's apartment. While Thompson and Kashani smoked hashish, Fleischli went to a nearby liquor store. During Fleischli's absence, Thompson told Kashani that he was leaving the following week for Thailand or

Vietnam and that he wanted Fleischli for the weekend. Thompson said that Kashani could have Fleischli after he was gone. Kashani agreed and left. Shortly thereafter, Kashani returned to the apartment to retrieve his cigarettes. Thompson appeared nervous when he opened the door and he left Kashani waiting outside while he got the cigarettes. Kashani stopped at a nearby liquor store to look for Fleischli, but did not find her.

Petitioner's Argument

By doing an inadequate investigation, Brower failed to learn that Kashani said he did not enter the apartment upon his return because he thought Thompson and Fleischli might be in a compromising position. He also failed to learn that Kashani had offered Fleischli a ride home that night, but she had declined because Leitch and Tracy were going to pick her up. Kashani also would have testified that Fleischli was not upset or crying that evening and had not argued with Thompson or anyone else.

Discussion

The information that Thompson contends could have been elicited from Kashani was of little significance; therefore, Brower's failure to present that testimony was not prejudicial.

(4) Failure to adequately investigate or cross-examine Tracy Obert Facts from the Transcripts

Tracy Obert, Leitch's friend and former roommate, moved out of the apartment that Leitch and Thompson were sharing one day before the murder. Obert testified that he moved out because he did not want to be a part of Thompson's plan to kill someone to get a boat to go to Southeast Asia and smuggle refugees.

Petitioner's Argument

Brower never attempted to interview Obert before the trial. Police reports available to Brower showed that Obert told the police he moved out of the apartment because he and Leitch had failed to pay the rent.

Discussion

Brower's failure to impeach Obert with the police report was not attorney error. The police report does not state that Obert gave a reason for moving out. The report merely notes that the lease on the Obert/Leitch/Thompson apartment was terminated as of September 15, 1981 for failure to pay rent and that Obert moved to his parent's house on September 10, 1981. [Exhibit R, p.642-43, Exhibits to Amended Petition] In addition, Thompson himself admitted that he planned to smuggle refugees from Southeast Asia. In light of that admission, Thompson was not prejudiced by Obert's testimony that he moved out because he did not want to be involved in Thompson's Southeast Asia adventure.

(5) Failure to elicit the extent of David Leitch's criminal record and history of violence toward Fleischli and Tracy

Facts from the Transcripts

During the defense portion of the guilt phase, Officer Ishmael of the Laguna Beach Police Department testified that on one occasion he met Fleischli and Tracy Leitch at Leitch's apartment. Fleischli had requested police assistance in retrieving her clothing from the apartment. Fleischli told Ishmael that she needed assistance because she had been having trouble with David Leitch, the man with whom she had been sharing the apartment. Specifically, Ishmael recalled Fleischli saying that she had had fights with Leitch in the past and he was

a very violent person. She indicated to Ishmael that on one occasion Leitch threatened her life and she was fearful.[26/]

At the guilt phase, the defense also called Sharon Yocum, a friend of both Fleischli and Leitch. After an extensive discussion between the court and counsel, the court allowed Yocum to testify, but cautioned the jury that Yocum's testimony could only be considered for Fleischli's state of mind. Yocum testified that in the summer of 1978, she told Fleischli about a trip she had taken with Leitch. During the trip, Yocum took a bible out of a hotel room drawer and Leitch started yelling not to read it and saying "Fuck God, Fuck Jesus." Leitch then picked up a wastepaper basket and threw it at Yocum, hitting the wall above her head. At another hotel, Yocum and Leitch had another fight. Yocum threw a sandal at Leitch. He responded by spitting in her face and throwing a temper tantrum. On the same trip, Leitch kicked and hit a man who was also traveling with them, knocked him against a truck, and gave him a concussion. The man needed stitches at a hospital. Yocum said that after she related these incidents to Fleischli, Fleischli told her that she knew that Leitch had previously beaten Tracy Leitch.[27/]

Petitioner's Argument

Brower failed to elicit from Officer Ishmael that: (1) the incident where he assisted Fleischli occurred only days before the murder; and (2) Fleischli sought assistance because Leitch had threatened to kill her and burn her clothes. Brower also failed to present evidence that Leitch had at least six previous

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26. At the conclusion of Ishmael's testimony, the court told the jury that Fleischli's statements were to be used only to establish Fleischli's state of mind and for no other purpose.

27. In fact, Tracy testified that she knew Leitch to be a violent person, particularly when he was drunk, and that he had been violent towards her in the past.

arrests, including three incidents of assault with a knife, and that Leitch had a history of violence against women, including Tracy and another woman who Leitch attacked with a knife and cut her clothes.

Discussion

Brower's actions were neither ineffective nor prejudicial. The defense did portray Leitch as violent and Fleischli as, on at least one occasion, fearful of Leitch. More importantly, the court ruled repeatedly that evidence about Leitch's violence was admissible only to show Fleischli's state of mind. Therefore, it is very doubtful that the court would have allowed the evidence which Thompson now wishes Brower had presented to the jury.

(6) Failure to adequately prepare or present sleep expert testimony

Facts from the Transcripts

Petitioner testified that after a night of drinking alcohol and smoking hashish and after having consensual sexual relations with Fleischli he fell asleep and slept through the murder. Brower called a sleep expert, Dr. Merrill Mitler, as a defense witness. Mitler, who specialized in the area of excessive sleepiness, explained the stages of sleep and how they affect arousability. He noted that the state of sleep can be influenced by alcohol and drugs. Mitler further testified that alcohol is a potent central nervous system depressant and would increase the difficulty in arousing someone. On cross-examination, Mitler acknowledged that he never examined Thompson and did not know whether Thompson had normal patterns of sleep or whether he had any sleep disorders.

Prior to sentencing, Thompson moved for a new trial on the basis of Brower's failure to have him sleep tested.[28] At the hearing on the motion, Brower admitted that Dr. Mitler had been contacted for the first time on the day of his testimony. Brower described his failure to have Thompson tested by a sleep expert as an "oversight" and opined that such testing would be standard practice in a case where testing was warranted.

At the motion for a new trial, the defense also presented the testimony of a psychologist, Dr. Michael Bonnet, who specialized in the area of sleep and who had expertise in diagnosing and evaluating sleep disorders. Bonnet testified that he did sleep tests with Thompson. The tests consisted of putting Thompson in a normal sleep environment, hooking him up to record brain waves (which signal whether or not someone is sleeping), and putting an audiometer hearing aid-type device in Thompson's ear. The purpose was to see what level of sound was needed to wake Thompson from a sound sleep. Bonnet did nine or ten awakenings of Thompson throughout one night (approximately one every half-hour).

Bonnet found that in stage two sleep, Thompson awoke at 86 decibels (similar to a smoke alarm) and in stage four sleep he awoke at approximately 100 decibels (slightly quieter than a loud rock concert). Based on data from other studies he had conducted, Bonnet concluded that during stage two sleep Thompson awakened at 30-40 decibels louder than average, and during stage four sleep he awakened at 15-25 decibels louder than average. Thompson, Bonnet opined, was more difficult to arouse than 90-95 percent of the population.

Bonnet noted Thompson was not given any alcohol or drugs during the study. Though he had no definite data to support

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28. After the trial ended, Thompson successfully moved to have Brower relieved as counsel because Brower had taken a job as a prosecutor in another county. See Section B(9), below.

him, Bonnet suggested that alcohol and hashish would make people sleep more deeply.

On cross-examination, Bonnet explained that the norms he used for decibel arousing were based on studies of a hundred people he tested. Bonnet also explained that he alternated the source of the sound using both standard laboratory beeps and a tape he made of a woman screaming while gagged. When the tape of the woman screaming was played, which ranged from 85-100 decibels, Thompson awoke from stage four sleep in 75 seconds. Bonnet played the tape again during REM sleep (deeper than stage two, but lighter than stage four) and Thompson woke up within 9 seconds.

Bonnet opined, based on his study, that Thompson woke up more easily in response to real life than with a regulated sound device. Bonnet concluded that Thompson was a sounder sleeper than most people, but that he did not suffer from any sleep disorder.

After Bonnet testified, the defense recalled Brower. He testified that he would not have used Bonnet as a witness because his report indicated that when Thompson heard a tape of muffled screams he woke up once in 75 seconds and another time in 9 seconds. Brower would not have wanted the jury to have that information.

The trial judge denied the motion for a new trial.

Petitioner's Argument

Although Brower knew that Thompson always maintained that he slept through Fleischli's murder, Brower never had Thompson examined or tested by a sleep expert. Brower compounded this error by having his investigator find a sleep expert on the day the expert was needed to testify at trial. Brower called Dr. Mitler to testify without giving him any real

preparation about the facts of the case. Had Dr. Mitler been given information about Thompson's alcohol and hashish consumption that night, he would have testified that Thompson's intoxication would have greatly increased his threshold of arousability for at least five hours.

Discussion

The trial court eventually heard all of the evidence Thompson is faulting Brower for not presenting. While Brower may have erred in his last-minute presentation of a sleep expert,[29] the trial judge eventually heard Brower's explanation for not having petitioner sleep-tested, as well as the testimony of a psychologist who did sleep-test Thompson. This Court finds it significant that the judge who sat through Thompson's trial was not moved to grant him a new trial based on the new sleep-testing information. Had Thompson never been sleep-tested and never had his day in court on this issue, his claim of ineffective assistance of counsel might have had some moment. Thompson, however, has had the benefit of both. This Court finds that the testimony of the sleep expert who sleep-tested Thompson failed to support the defense that Thompson slept through Fleischli's murder. Accordingly, Thompson cannot demonstrate how Brower's omission prejudiced his case.[30]

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29. Brower's actions may, in fact, have been the right decision made for the wrong reasons. Dr. Mitler's testimony, though very general in content, did support the defense "lay persons" theory that drinking alcohol and smoking hashish makes a person sleep more soundly.

30. The Court questions the value of any sleep testing that did not mirror the conditions the night of the murder. That night, according to trial transcripts, Thompson consumed large amounts of alcohol and smoked hashish. The results of any testing conducted under other conditions would, arguably, be irrelevant.

(7) Failure to adequately prepare Thompson to testify or to provide him with sufficient information to make an informed judgment about whether to testify

Facts from the Transcripts

At the motion for a new trial, Gleim testified that he was present at a discussion between Thompson and Brower where Thompson said he was going to testify regardless of any advice given to him by anyone.

Thompson testified at the motion for a new trial that Brower saw him in jail only two or three times.[31] Brower never prepared him to testify. He never went over direct examination with Thompson. Despite promising to bring another person to the jail to practice questioning Thompson, Brower never did so. Thompson emphatically agreed that it was his intention all along to testify and tell his side of the story. Brower was always aware of Thompson's intentions.

On cross-examination, Thompson acknowledged that the day he testified, Brower spent 20 to 30 minutes going over his questions and listening to Thompson's answers prior to Thompson taking the stand. Thompson then testified that after this rehearsal Brower said to him, "I think it's about time you started listening to your attorney and not testify" to which Thompson replied, "I'm sorry, but I have to do this."

Thompson estimated that Brower talked to him in his holding cell during the trial approximately half of the days of the two month trial. On redirect, Thompson said the holding cells were not private and sometimes other people would be there when Brower was talking to him.

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31. The trial court admitted and read documents from the jail establishing the numbers of visits Brower made to Thompson in jail.

Brower testified at the motion for a new trial that during pretrial time in municipal court, he talked to Thompson at least 20 times during court appearances, plus each day of the preliminary hearing. As the trial approached and once the trial began, Brower discussed with Thompson, with increasing frequency, his opinion that Thompson should not testify and what the problems were with Thompson's testimony.

Brower estimated that he spent a total of thirty hours with Thompson preparing for and during trial. Brower had a general policy of not talking to defendants at the jail because of the lack of privacy. Often Brower would send his investigators to the jail to follow-up leads with Thompson. He estimated he did that 15 to 20 times.

Brower remembered telling Thompson he would bring someone to the jail to help prepare Thompson to testify. He acknowledged that he never did so because he was concerned about Thompson's inability to relate well or emote. Brower believed that if he rehearsed with Thompson, Thompson would lose what little spontaneity he had. He considered that a trial run might show Thompson just how bad his testimony would be, but he did not think that even that would change Thompson's mind about testifying.

At Thompson's automatic motion for modification, Thompson, in his final remarks to the court, said, "In December of 1983, I ignored my ex-counsel, Ronald Brower, when he insisted that I not take the stand on my own behalf."

Petitioner's Argument

Brower visited Thompson only three times in jail during his representation. None of the visits took place during the trial or even during the year of the trial. Brower promised to bring another attorney to the jail and practice direct and cross-examination with Thompson, but never did so. Brower's

sole preparation for Thompson's testimony was spending five minutes with Thompson in a nonprivate holding cell just prior to Thompson taking the stand.

Brower's examination was unprepared and caused Thompson to open the door to questioning about his planned trip to Southeast Asia and his plan to kill anyone who got in his way. Due to illnesses, Thompson's cross-examination was delayed seven days. Despite the break, Brower failed to prepare Thompson for cross-examination. Indeed, Brower noted on the record that he was still ill on the day of Thompson's cross. Brower failed to object to numerous argumentative and irrelevant questions asked by the prosecutor. Then, after Thompson suffered through a brutal cross-examination, Brower failed to ask any questions on redirect to mitigate the damage.

Testimony from the Evidentiary Hearing

Brower testified that he rarely visited Thompson in jail because he assumed that visits are monitored or recorded. For privacy reasons, Brower preferred talking to Thompson at the courthouse. On occasion, Brower had Thompson brought to the courthouse just to interview him even though no court proceedings were scheduled. Brower was, at times, permitted to talk to Thompson in the judge's chambers without the bailiff present, or in jury rooms, or in holding cells.

Brower acknowledged telling the judge that he advised Thompson not to testify. The judge had an in camera hearing with Thompson urging him to listen to counsel. Brower does not recall telling this to the prosecutor. Brower never thought about that information being privileged, but says now that it probably was. He did not have Thompson waive the attorney-client privilege before talking to the judge.

Brower recalled preparing Thompson to testify, including discussing numerous cross-examination topics.

Discussion

The record establishes quite clearly that Brower attempted repeatedly to persuade Thompson not to testify and that Thompson steadfastly refused to heed his advice. The record also establishes that Thompson's testimony was devastating to his defense. Thompson cannot attribute this devastation to Brower.

The effectiveness of counsel does not depend upon the quantity of time that counsel spends with his client, but rather on the quality of counsel's work. See United States v. Taylor, 802 F.2d 1108, 1119 (9th Cir. 1986), cert. denied, 479 U.S. 1094 (1987); Murray v. Maggio, 736 F.2d 279, 282 (5th Cir 1984). Accordingly, resolving the issue of how many hours Brower and Thompson spent together is irrelevant. Brower has explained his reasons for not putting Thompson through a mock cross-examination and has also explained why he elected not to conduct a redirect examination. The court finds these explanations to be credible and reasonable tactical choices.

While the Court is troubled by the opening of the door to testimony about Southeast Asia, in the final analysis, that testimony was not prejudicial in the Strickland sense. Petitioner exercised his constitutional right to testify. That testimony was riddled with inconsistencies and outright falsehoods. The **totality** of Thompson's testimony no doubt affected the jury's verdict. This Court cannot say, however, that without the Southeast Asia testimony there is any probability, let alone a reasonable probability, that the outcome would have been different.

(8) Failure to tell Thompson that he had a right to a second attorney

Petitioner's Argument

Brower never told Thompson that he had a right under state law to the appointment of a second attorney. See Keenan v. Superior Court, 31 Cal.3d 424, 180 Cal.Rptr. 489 (1982).

Discussion

Federal habeas corpus relief is not available for violations of state law. Estelle v. McGuire, 502 U.S. 62, 116 L.Ed.2d 385, 396 (1991). Thompson can only obtain relief, therefore, if he demonstrates that Brower's failure to retain second counsel caused him to make constitutional errors that prejudiced Thompson's defense. The mere correctness of Brower's decision not to seek formal appointment of second counsel is not at issue. Thompson has not made any specific allegations about how the absence of second counsel violated his Sixth Amendment rights. To the extent Thompson is alleging that the acts or omissions set forth in section B of the amended petition are a result of having only Brower as his attorney, those allegations are discussed separately under each sub-section.

(9) Failure to advise Thompson that he was seeking a job as a district attorney

Facts from Trial Transcript

At the date set for the hearing on Thompson's automatic motion for modification of sentence, Thompson requested that Brower be relieved as his attorney because Brower accepted a job with a district attorney's office in another county after Thompson's trial ended. Brower concurred with the request. He stated that he felt he had to declare a conflict since he was

then employed as a prosecutor. The court agreed and with Thompson's consent appointed new counsel.

Petitioner's Argument

Brower failed to advise Thompson that while representing him, he was seeking employment in the district attorney's office in another town.

Discussion

Petitioner has failed to explain how Brower's job search prejudiced his defense. Accordingly, there is no constitutional error. See e.g. Garcia v. Bunnell, 33 F.3d 1193 (9th Cir. 1994) (the mere fact that a defense attorney has accepted future employment with the district attorney's office does not create an actual conflict); United States v. Horton, 845 F.2d 1414, 1419-1421 (7th Cir. 1988) (in the absence of evidence to the contrary, there is no presumed conflict when a federal defendant is represented by an attorney who is concurrently seeking a position as a U.S. Attorney).

(11) At the penalty phase, Brower presented damaging psychological testimony and argument and failed to adequately investigate or present mitigating evidence

Facts from Trial Transcripts

Dr. Kara Cross

At the penalty phase, the defense called Dr. Cross a practicing psychotherapist with a Phd. in criminal psychology. Cross stated that in preparation for her testimony, she administered a number of psychological tests to Thompson and also interviewed him, as well as his parents and sister.

Based on her interviews with the family, Cross described Thompson's family structure as very, very rigid. Thompson's stepfather considered himself the sole head of the house and placed all other considerations and people secondary to himself. Thompson's mother supported her husband, no matter what the consequences were, to maintain the family balance.

Thompson's stepfather was a strict disciplinarian who frequently physically punished Thompson using a thick leather belt. If Thompson cried or showed any emotion during the punishment, he was punished further. Cross explained that this type of punishment taught Thompson not to have feelings and emotions and certainly not to express them.

Thompson, at all times had to conform to his stepfather's way of thinking or feeling or his stepfather would humiliate him. As an example, Cross recounted a time as a youngster when Thompson, unable to hide his anger, broke a tennis racket. His stepfather made him hang the racket on the wall of his room. When people came to the house, the stepfather would bring them to Thompson's room and require Thompson to explain that he broke the racket when he could not control himself.

In essence, Cross testified, Thompson was belittled or punished for showing any part of himself to his family. As a consequence, Thompson was unable to develop any sense of self. Unless he became what others (mostly his stepfather) wanted of him, he faced rejection and punishment. And, in the most unsettling aspect, he was sometimes punished or rejected even if he did exactly what his stepfather wanted.

According to Cross, Thompson's stepfather created other problems involving Thompson's biological father. Thompson's stepfather feared that Thompson's real father might usurp some of his authority. If Thompson expressed any individualization, his stepfather would "punish" him by threatening to send him to his father's and then when Thompson would get to his father's,

the stepfather would make him come back home. Cross referred to this as sending double-bind messages. These type of messages cause a child to be extremely confused, very angry, very frustrated, and leave the child feeling insecure.

To compensate for this lack of self, a person such as Thompson will take on other personalities as an ego defense. The idea is that if others do not like "me," whoever "me" is, I will become someone who they will like.

The family dynamics were further marked by the forced sexual relationship between the stepfather and Thompson's sister. As children, the only possible adult ally Thompson and his sister had was their mother, yet she ignored the stepfather's behavior and never intervened. This left Thompson feeling helpless and vulnerable to whatever the power authority, the stepfather, wanted.

Cross opined that the type of psychological abuse experienced by Thompson is far worse than more readily observable physical abuse because powerful psychological abuse damages the personality and can destroy a person.

Cross believed that Thompson has a number of psychiatric diagnoses. He has a mixed personality disorder, showing signs of both a narcissistic personality disorder and an antisocial personality disorder. The narcissistic part is manifested by Thompson's preoccupation with himself and his fantasy adventures. The antisocial part is reflected by Thompson's inability to hold a job and his inability to handle financial obligations. Cross added that Thompson does not meet the criteria for either narcissistic or antisocial personality by itself.

Cross also diagnosed Thompson as having an atypical psychosis. She pointed out that Thompson was not truly psychotic --he denied any type of hallucinations-- but he experiences loose associations and fragmented thinking. In

addition, he honestly believes some of his fantasies, such as having been in the jungles of Vietnam and having worked for the C.I.A., even though the fantasies are not based on reality.

Cross theorized that all of the diagnoses resulted from his family structure and emotional stresses he experienced as a child. While Thompson does not experience a complete break from reality, his life revolves around his fantasies which he hopes will cause people to like him, rather than cause them to reject his real self. She contrasted this type of person with a pathological liar. A liar, Cross explained, knows he is lying, but does it anyway. Thompson, on the other hand, believes his fantasies, even though he is not out of touch with reality in other aspects of his life. Thompson's fantasies were a well-honed psychological defense against rejection of his true self, a rejection he experienced time and again as a child at home. If Thompson had not developed these defenses, Cross opined, he would likely be completely psychotic and completely removed from reality.

Cross attempted to differentiate between how Thompson developed and his sister developed, by explaining that despite his sister's repeated sexual abuse, she experienced less emotional abuse than Thompson. Indeed, Thompson's sister told Cross that she would have done anything to avoid being treated the way Thompson was treated as a child.

When asked to summarize Thompson's family, she described it as "very, very pathological." When asked to summarize Thompson, she described him as "very, very sad and confused and defensive and depressed."[32]

32. Dr. Cross was not cross-examined.

Dr. Francis Crinella

The defense also called Dr. Crinella, a clinical psychologist, at the penalty phase. Dr. Crinella, like Dr. Cross, interviewed Thompson's family, as well as Thompson. Crinella described Thompson's mother as "cold, manipulative, demanding, and extremely self-centered." Crinella depicted Thompson's father in a similar light: "extremely neurotic, extremely manipulative, extremely demanding, perfectionistic, insecure, that he viewed the world from an incredibly black and white perspective and was completely lacking in any insight with respect to any character problems that he himself may have had."

Based on his interviews, Crinella believed that Thompson's stepfather was a hard, demanding, and very neurotic father to Thompson. In addition, the stepfather strongly discouraged Thompson from having any love, affection, or relationship with his biological father. This created a conflicted situation for Thompson who wanted to maintain both a relationship with his father and peace at home.

Crinella testified that the marriage between Thompson's mother and stepfather was largely based on the stepfather's wealth and tendency to lavish gifts on the mother. After about six years of marriage, the stepfather's finances took a bad turn. The stepfather turned to Thompson's sister for sexual gratification. The stepfather's sexual relationship with his stepdaughter continued for about seven years, the same years during which his harsh treatment of Thompson escalated.

Crinella opined that the ultimate effect the family turmoil had on Thompson was that he failed to develop a conscience. According to Crinella, Thompson never needed to learn right from wrong because his stepfather served as his external conscience. His stepfather continually told him what to do, how to do it, and corrected Thompson's "wrong" behaviors. In addition, Thompson learned to manipulate attention by doing

bad things. Thompson found that if he was good, that was expected, consequently no one noticed him. Therefore, he purposefully acted badly to get attention, even if it was negative attention.

Crinella said Thompson exhibited "pseudologia fantastica," lying of the first magnitude. He lies for the fun of it. The bigger the lies, the more he enjoys himself. Thompson learned to lie and manipulate as a child to survive in his family. Eventually, lying became a way of life. Crinella opined that Thompson likes to tell a monumental lie and then enjoys the excitement of being confronted and then telling a bigger lie to undo the earlier lie.

Crinella described Thompson as bright, well-coordinated, with a vivid imagination. In addition, he found Thompson to have difficulty separating fantasy from reality, as well as having extremely limited insight, poor judgment, and poor impulse control. Crinella concluded that Thompson has a severe personality disorder and that his childhood largely contributed to the formation of that disorder.

On cross-examination, Crinella stated that he saw no psychoses or neuroses in Thompson that would require hospitalization or psychiatric treatment. Crinella further stated:

> In fact, the kind of condition he has is very resistive to psychiatric treatment, but I would not say that his condition allows him to function on the outside. I think it's of such a severity that he is a walking disaster waiting to happen. I think if he weren't in trouble for this, he would have been in trouble for something.

Crinella described Thompson as bright, with above-average intellect. He opined that Thompson could distinguish right from wrong and was aware of what the law requires.

Based on an interview with Thompson, Crinella believed that despite outward appearances of doing well in high school, Thompson had no close ties or relationships with anyone. He recounted how Thompson turned to narcotics after his marriage broke up and he joined the military. Crinella agreed with the observation that Thompson's problems (e.g. drugs, marriage) began after Thompson was no longer under his stepfather's influence.

Crinella said he interviewed Thompson for two hours, Thompson's parents for two hours, and Thompson's sister for 1½ hours. Thompson's stepfather did not admit that he molested Thompson's sister. Crinella, however, based on his years of experience, did not have reason to doubt the story.

Petitioner's Argument

Even though Thompson had no prior history of crimes or violence, Brower presented two psychologists who testified about Thompson's mental state and who portrayed Thompson in a very unflattering light.

Discussion

This Court granted an evidentiary hearing on this issue. Nevertheless, petitioner failed to address this issue during Brower's testimony. As evidenced by the above summary, the testimony of the two psychologists vividly depicted the oppressive emotional environment in which Thompson was raised. This evidence was certainly compelling mitigation. Dr. Crinella, however, potentially undermined the value of his mitigating testimony by opining on cross-examination that Thompson was a walking disaster waiting to happen and that he expected that if Thompson were not in trouble for the rape/murder, he would have been in trouble for something else.

At issue is whether Brower's use of Dr. Crinella as a defense witness at the penalty phase was an error of constitutional dimension that prejudiced Thompson. Given the state of the record, the Court must conclude that it was not. In a declaration offered as direct testimony at the evidentiary hearing, Dr. Crinella stated that he told Gleim and Brower several times that his testimony would not be helpful to petitioner. Crinella understood his role as a witness was to get Thompson's horrible upbringing before the jury. He felt prepared to give that testimony and did so in the best manner he could.

At the evidentiary hearing, Brower was never asked to comment on why he decided to call Crinella as a witness knowing that Crinella was concerned about the utility of his testimony. Under the circumstances, the Court presumes that Brower had a tactical reason for offering Crinella's testimony. See Morris v. California, 966 F.2d 448, 456 (9th Cir.), cert. denied, 121 L.Ed.2d 57 (1992); Tomlin v. Myers, 30 F.3d 1235, 1247 (9th Cir. 1994). Indeed, Brower's deposition testimony bears out the presumption. During his May 1991 deposition, Brower stated that he was aware of Crinella's views about petitioner's potential for trouble, but felt that testimony would benefit petitioner at the penalty phase. [Brower Deposition, II/321325] He explained that given the jury's guilt phase verdicts, Dr. Crinella's testimony could not be prejudicial and might, in fact, mitigate petitioner's penalty by linking petitioner's psychological problems to his childhood experiences. [Id.] The jury would then be instructed that emotional factors could be considered in mitigation. [Id.]

While **in hindsight** Brower's strategy might not stand up to close scrutiny, his tactical decision **made at the time** about how best to proceed during the penalty phase was well within the wide range of reasonable strategies available to Brower. Moreover, this Court cannot conclude that there is a reasonable probability that the jury would have selected life without the

possibility of parole but for Dr. Crinella's comments during cross-examination.

(12) Failure to request proper jury instructions

Petitioner's Argument

Thompson believes that Brower should have requested the following jury instructions:

--(1) view testimony of informants with distrust

--(2) assume sentence will be carried out

--(3) potential for rehabilitation and positive adjustment are proper factors to consider in mitigation

--(4) lingering doubts about guilt or intent to kill are proper factors to consider in mitigation

--(5) other crimes evidence is not an aggravating factor unless the jury finds the crimes to have been proved beyond a reasonable doubt

Facts from the Transcripts

Testimony of informants

Brower requested and received CALJIC 2.20 (discussing the assessment of the credibility of witnesses), as well as CALJIC 2.21 (discussing willfully false testimony versus discrepancies in testimony), CALJIC 2.22 (weighing conflicting testimony), and CALJIC 2.23 (considering prior felony convictions when assessing credibility). [CT V/1584-1588]

Sentence to be carried out

Brower requested, and the court refused, a jury instruction explaining that the jury should assume that whichever sentence is given, it will be carried out. [RT 22/2868-2872, also CT V/1772]

Potential for rehabilitation

Brower requested an instruction about the potential for rehabilitation and the ability to lead a useful life while incarcerated, but the court refused that request. [CT V/1702]

Lingering doubt is mitigating

Brower requested, and was refused, an instruction saying: "At this hearing, you have heard testimony which may indicate that the defendant did not specifically intend the death of the deceased. This evidence, if you find it to be true, may be considered by you as evidence of mitigation." [CT V/1758, 1768, 1778-1780]

Other crimes must be proven beyond reasonable doubt

Brower requested and received an instruction saying, in relevant part, "before you consider any fact or set of circumstances as an aggravating circumstance all jurors must find that the fact or set of facts has been established by the evidence beyond a reasonable doubt." [CT V/1738] In addition, Brower requested, but was refused, a jury instruction saying, in relevant part, "in order to use these other alleged planned offenses or acts against him, as factors in aggravation in the penalty phase, you must be unanimous in your determination that the other planned acts, and his intent to carry them out, have been proved beyond a reasonable doubt." [CT V/1757, 1765]

Discussion

As the above facts demonstrate, petitioner's claim is without merit.

(13) Failure to object or seek admonitions regarding the prosecutor's misconduct

Facts from Transcripts

During closing argument at the penalty phase, the prosecutor made the following remarks:

> And so for one single, isolated, unprovoked, uncalled for atrocity, should this man be sentenced to the ultimate punishment? Or should he be spared because there's just one atrocity and not two, or not three? Shall we ask ourselves if even in prison can we be sure he won't kill again? (Emphasis added.)

Brower did not object to these statements, or to any other part of Jacobs' closing argument.

Petitioner's Argument

Brower's failure to object to the prosecutor's statement that Thompson would likely kill again if he was not sentenced to death caused Thompson to waive the issue of prosecutorial misconduct on appeal.

Discussion

It is axiomatic that the prosecutor's comments must be improper if Brower is to be faulted for failing to object. A prosecutor's remarks will not violate the Constitution unless the remarks "so infected the trial with unfairness as to make the

resulting conviction a denial of due process." Donnelly v. DeChristoforo, 416 U.S. 637, 643 (1974).

In this case, petitioner takes exception to the prosecutor's comment in which he ponders the likelihood of Thompson killing again in prison. The United States Supreme Court has held, on more than one occasion, that future dangerousness is a proper factor for a penalty phase jury to consider. See e.g. Jurek v. Texas, 428 U.S. 262 (1976); California v. Ramos, 463 U.S. 992 (1983). Jurek and Ramos demonstrate that the prosecutor was well within constitutional bounds when he asked the jury to consider whether Thompson might kill again in prison. Because the prosecutor's comments were not constitutionally impermissible, Brower's failure to object to the comments did not amount to a Sixth Amendment violation. Moreover, the prosecutor's brief comment was not prejudicial within the meaning of Strickland.

(14) Inadequate and untimely trial preparation

Petitioner's Argument

Brower was always uninterested in Thompson's case because it did not pay enough. In fact, he never kept time records and never submitted his $50,000 bill for payment until years after the case concluded. In addition, Brower delegated the bulk of the case to two investigators. He failed to submit bills for one investigator for over one year causing the investigator to lose motivation in the case.

Discussion

Inadequate preparation is not itself a valid basis for finding a Sixth Amendment violation. Instead, petitioner must demonstrate to the Court that the inadequate preparation caused Brower to do or not do some act which constituted ineffective assistance of counsel. To the extent that petitioner is

arguing that Brower's inadequate preparation resulted in the acts and omissions discussed elsewhere in issue B, then those allegations are discussed under each sub-section.

Issue C: Breach of attorney-client privilege and duty of loyalty by telling judge and prosecutor that Thompson testified against his advice

Petitioner's Argument

Brower informed the judge and the prosecutor that Thompson testified against his advice. This allowed Jacobs to argue during the guilt phase closing argument that even Thompson's attorney did not believe Thompson.

Facts From the Transcripts

Contrary to petitioner's argument, there is nothing in the record and nothing offered by petitioner to support the allegation that Brower told Jacobs that Thompson was testifying against his advise. Instead, after Thompson testified and before closing arguments, the judge made the following two comments in the presence of the prosecutor, but out of the presence of the jury:

> The Court will state for the record that counsel indicated to me long before the defendant ever took the stand that he advised his client not to and the defendant was adamant and wanted to take the stand and demanded in effect to take the stand against the advice of counsel and we'll not know until the outcome of the case, but it probably was a mistake on the defendant's part and not on defense counsel's part from the court's view.

[RT 20/2519]

> And the only reason the Court made those comments about the defendant taking the stand without the acquiescence of defense counsel was for the purpose of no one believing that defense counsel joined in the folly of his client testifying in my observation.

[RT 20/2538]

Discussion

The duty of loyalty owed to a client is one of the "most basic of counsel's duties." Strickland, 466 U.S. at 692. This duty, however, is not infinite in scope. The important question is whether counsel's conduct "has utterly failed to 'subject the prosecution's case to meaningful adversarial testing.'" United States v. Swanson, 943 F.2d 1070, 1074 (9th Cir. 1991) (quoting United States v. Cronic, 466 U.S. 648, 659 (1984)); see also Osborn v. Shillinger, 861 F.2d 612, 625 (10th Cir. 1988) (also quoting Cronic, that "an attorney who adopts and acts upon a belief that his client should be convicted 'fail[s] to function in any meaningful sense as the Government's adversary'").

The duty of loyalty protects a defendant from blatant dereliction of duty by defense counsel. For example, the duty of loyalty prevents a defense attorney from telling a jury "that there is no reasonable doubt regarding the only factual issues that are in dispute" with respect to the charges against his client. Swanson, 943 F.2d at 1074. Similarly, an appointed lawyer who aims racial epithets and profanity at his client and informs the client that he will receive ineffective assistance if he insists on going to trial also fails the duty of loyalty. See Frazer v. United States, 18 F.3d 778 (9th Cir. 1994).

On the other hand, minor lapses in attorney discretion do not violate the duty of loyalty. In United States v. Baldwin, 987 F.2d 1432, 1437 (9th Cir.), cert. denied, 124 L.Ed.2d 696 (1993), for instance, the court found no breach of the duty of loyalty

when defense counsel told the prosecutor and judge on the morning of trial that his client did not have a defense. The Baldwin court found that defense counsel's comments, made in response to questioning by the judge about the defendant's request for new counsel and not made in the presence of the jury, did not demonstrate a genuine breakdown in the adversarial process under Cronic or Swanson. 987 F.2d at 1437-1438. Nor was there a sufficient showing that the result would have been different in the absence of defense counsel's statements. Id. at 1438.

The facts of this case, like the facts in Baldwin, do not rise to the level of a breach of the duty of loyalty. Brower's comments to the judge, who in turn acknowledged the comments in the presence of the prosecutor, were not made in the presence of the jury. Brower's conduct, though perhaps imprudent, was not so egregious as to demonstrate a breakdown in the adversarial process. Moreover, the prosecutor's comments during closing argument were not harmful (see claims E(3)(a) and J, below).

C. INCONSISTENT THEORIES

Issue A: The prosecutor pursued legally and factually inconsistent theories at Thompson's and Leitch's trials[33]

Petitioner's Argument

Thompson contends that the prosecution relied on three different theories between the preliminary hearing, Thompson's trial, and Leitch's trial. Initially, at the joint preliminary hearing, the prosecution pursued a theory of joint culpability: Leitch

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33. Thompson and Leitch were tried separately. Leitch, who was tried second, was convicted of second-degree murder and sentenced to 15 years to life.

wanted Fleischli dead and hired Thompson to help kill her. Four jailhouse informants testified that Thompson and Leitch acted together. The informants' testimony indicated that Fleischli was not raped, but rather that Thompson and Fleischli engaged in consensual sex prior to her murder. The defense presented two other informants who testified that one of the prosecution informants fabricated his testimony.

Following the preliminary hearing, Leitch asked for and received, without objection from the prosecution, a severance of his trial. The prosecution tried Thompson first. Thompson argues that the prosecution desired separate trials in order to present two different and irreconcilable theories of the crime.

At Thompson's trial, the prosecution argued that Thompson alone raped and murdered Fleischli. The prosecution did not call any of the four informants from the preliminary hearing. Instead, two new informants testified that Thompson admitted raping Fleischli. Their testimony also exonerated rather than implicated Leitch. The prosecutor theorized that Thompson murdered Fleischli by himself to prevent her from reporting the rape and interfering with his plans to go to Southeast Asia. Leitch's contribution was solely to assist Thompson in disposing of the body. The prosecution attempted to exclude or refute any defense evidence that Leitch had a motive to kill Fleischli or that he had a violent history. Despite the prosecutor's attempts to defuse evidence pointing to Leitch, the prosecutor served subpoenas for Leitch's trial upon defense witnesses who implicated Leitch, as the witnesses exited the courtroom after testifying in Thompson's trial.

At Leitch's trial before the same trial judge, the same prosecutor changed tactics and argued that Leitch was equally or more culpable than Thompson. The prosecution attempted to show that Leitch conspired with Thompson, was present at the murder, and either did the actual killing or assisted Thompson in inflicting the fatal wounds. During Leitch's trial,

the prosecutor called some of the same witnesses called by the defense in Thompson's trial. While the prosecutor objected to the witness' testimony in Thompson's trial, he not only presented the witnesses at Leitch's trial, but he vouched for their credibility.

Thompson has compared the prosecutor's statements made at the two trials to show that the prosecution presented inconsistent theories about the identity of the perpetrator, the presence of Leitch in the apartment, the murder weapon, and the motive. Thompson concludes that the prosecution's use of inconsistent theories denied him fundamental fairness and due process in violation of the Fifth, Eighth, and Fourteenth Amendments.

Discussion

The parties and the Court have found few cases discussing the use of inconsistent prosecutorial theories in the separate trials of codefendants. In Haynes v. Cupp, 827 F.2d 435, 439 (9th Cir. 1987), the Ninth Circuit rejected a claim that a change in the prosecutor's theory between trials of co-defendants violated the Constitution. The court agreed that the trials differed in emphasis, but concluded that the underlying theory of the case, equal culpability, remained consistent. Id.[34]

The Eleventh Circuit twice reviewed a case that parallels Thompson's allegations. In the original opinion, the court found no constitutional violation. See Drake v. Francis, 727 F.2d 990, 994 (11th Cir. 1984)[35]. But, on rehearing en banc, the court

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34. Unfortunately, the Haynes decision contained virtually no facts, thus making any type of analogy impossible.

35. In Drake, two defendants, Campbell and Drake, were accused of the same murder, but were tried separately. In Campbell's trial, held first, the state argued that Campbell was the actual murderer, while Drake played a lesser role. The jury convicted Campbell of murder. One year later, the

declined to reach the inconsistent theory issue after granting relief on other grounds. See Drake v. Kemp, 762 F.2d 1449, 1451 (11th Cir. 1985) (en banc). Judge Clark, however, in a lengthy concurrence, found the prosecutor's use of inconsistent theories to be a "fundamental and egregious error" that violated the Fourteenth Amendment's requirement that trials be fundamentally fair. Id. at 1470 (Clark, J. concurring).

Under similar circumstances, the state of Washington declined to find constitutional error when the prosecution made different arguments in the trials of co-defendants. See State v. Mak, 718 P.2d 407, 414-415 (Wash. 1986); State v. Ng, 713 P.2d 63 (Wash. 1985). Codefendants Mak and Ng were tried separately for the murders of 13 patrons of a nightclub. Mak, in his appeal, claimed that his right to due process was violated because the prosecutor at each trial asserted that his defendant held the gun and fired the fatal shots. Mak, 718 P.2d at 414. The appellate court disagreed because: (1) the prosecutors in both cases had one basic theory --that Mak masterminded the murders and recruited Ng to assist him; (2) the prosecutors emphasized that the jury need not determine who actually fired the shots in order to convict the defendant for murder; (3) the prosecutor at Mak's trial never actually argued that Mak fired the gun; and (4) the only true inconsistency was that each prosecutor argued that his defendant purchased the murder weapon. Id. The court further noted that a prosecutor may draw reasonable inferences from the facts presented at a trial;

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same prosecutor at Drake's trial argued that Campbell did not have the physical ability to be the sole murderer; therefore, Drake must have assisted in the murder. The jury convicted Drake and he received a death sentence.

In rejecting Drake's argument that the pursuit of wholly inconsistent theories was an "affront to the rudimentary demands of justice" in violation of his due process rights, the court found that the theories were fairly consistent. Drake, 727 F.2d at 994. At each trial the state took the position that both defendants were involved in the murder. The trials differed only in assigning the relative level of culpability to each defendant. That difference, the court concluded, did not violate due process. Id.

therefore, it would be unreasonable to expect the prosecutors to have made identical arguments when different evidence was offered at each trial. Id. at 415.[36]

In another case of prosecutorial inconsistency between codefendants, the Southern District of Texas granted habeas relief to a capital defendant after finding that the prosecutor in each case argued that his defendant fired the fatal shot even though only one bullet killed the victim. See Nichols v. Collins, 802 F.Supp. 66, 74 (S.D. Tex. 1992). The Nichols court commented, "the integrity of the judicial system commands that citizens can rest assured that prosecutors are seeking truth and justice; and that when they find truth and justice they cannot seek a different truth and justice from the first." Id. In Nichols, the two "truths" were physically incompatible because the law of physics does not allow two people to shoot the same bullet from two different guns. Id.

Like the Nichols court, this Court believes that prosecutorial inconsistency in the separate trials of co-defendants will violate due process only if the inconsistencies are truly incompatible. With that limitation in mind, prosecutors must be given license to argue the evidence presented.

As noted previously, the Court has read the transcripts of both Thompson's trial and Leitch's trial and concludes that the trials differed mainly in emphasis. In both cases, the overriding theory was that Thompson was the murderer and that Leitch assisted in concealing the crime. Indeed, the verdicts in both cases are consistent with this theory. Thompson was convicted of first-degree murder and rape and the jury found true the special circumstance of murder committed during the

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36. Mak's death sentence was later reversed for ineffective assistance of counsel at the penalty phase. See Mak v. Blodgett, 754 F.Supp. 1490 (W.D. Wash. 1991), aff'd, 970 F.2d 614 (9th Cir. 1992), cert. denied, 113 S. Ct. 1363 (1993).

commission of rape. Leitch, on the other hand, was convicted of second degree murder and acquitted of rape.

It is true that at Leitch's trial the prosecutor went into more detail about Leitch's involvement and argued that Leitch was more involved. This is not surprising, however, since Leitch was on trial, not Thompson. Plus, it is quite likely that the prosecutor gathered more evidence against Leitch through defense witnesses presented at Thompson's trial, since Thompson's defense was an attempt to implicate Leitch. At each trial, the prosecutor argued from the evidence presented. At Thompson's trial, the defense presented evidence that Leitch was the killer and that Thompson was not involved in the murder. The prosecutor refuted this evidence and pushed for the jury to find that Thompson was the actual killer. At Leitch's trial, the defense presented evidence that Leitch was only an accessory after the fact, with Thompson being responsible for the murder. The prosecution's theory was that Thompson was the actual killer, but that Leitch was at least equally culpable.

The paramount difference between the two trials was the emphasis on Leitch's responsibility. At Thompson's trial, Leitch's involvement was minimized. At Leitch's trial, his involvement was emphasized. In truth, no one, with the exception of Thompson and Leitch, knows what happened the night Fleischli was murdered. This Court certainly cannot say who was in the apartment after Kashani left, who administered the fatal stab wound, what knife was used to commit the murder, or what motivated the perpetrator(s) to kill. What is clear is that Thompson and Leitch both contributed to Fleischli's death.

The differences between the two trials are not incompatible. The prosecutor made valid arguments based on the evidence adduced at trial. The defense had the opportunity, as Brower did, to present a different spin and to argue the culpability of the other defendant. Thompson's due process rights were not

violated by the prosecutor's differing emphasis between the two trials.[37]

D. PROSECUTORIAL MISCONDUCT CLAIMS

Issue D: False evidence presented by prosecution

Petitioner's Argument

Thompson contends that the following false evidence was presented at his trial:

1) Tracy Leitch

The prosecutor allowed Tracy to testify that Fleischli said on the night of her death "Do you think that Tom would kill me?" In reality even though he had tapes of Tracy telling Leitch that Fleischli really said "Do you think David would have Tom kill me?" The prosecutor's tapes also contained evidence that Tracy, on two other occasions, told David either that she had already lied to the police or would lie to the police to protect him.

2) Edward Fink

Fink's testimony that Thompson admitted raping and murdering Fleischli was false. In addition, Fink's testimony about his aliases, his informant history, and the favors he received from law enforcement was also untrue.

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37. In analyzing this claim, the Court relied only on the trial transcripts of the two prosecutions. The personal feelings and motivations of the prosecutor are irrelevant. Accordingly, the Court read but did not consider the testimony provided by the prosecutor, Michael Jacobs, in his two depositions.

3) John Del Frate

Del Frate's testimony that Thompson admitted raping and murdering Fleischli was false.

Discussion

When a prosecutor knowingly uses perjured testimony or knowingly fails to disclose to the defense that testimony was false, then the conviction must be set aside if "there is any reasonable likelihood that the false testimony could have affected the jury verdict." United States v. Endicott, 869 F.2d 452, 455 (9th Cir. 1989), citing, United States v. Bagley, 473 U.S. 667, 678-80 (1985); see also United States v. Agurs, 427 U.S. 97 (1976) ("A conviction obtained by the knowing use of perjured testimony is fundamentally unfair, and must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury.").

If, on the other hand, the prosecutor was unaware of the perjury, then newly discovered evidence of perjury warrants a reversal only if "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Endicott, 869 F.2d at 455, citing, Bagley, 473 U.S. at 678-80.

Here, the prosecutor's knowledge of Tracy's perjury is irrelevant. Petitioner's contention fails under both tests because Tracy's perjury did not affect the outcome of the trial. The jury learned during the trial about the false part of Tracy's testimony and also heard the true version of her testimony.

As for the testimony of Fink and Del Frate, petitioner has never affirmatively demonstrated that the informants lied about

Thompson's admissions to them. Instead, petitioner has cast doubt on the informants' credibility not based on what the informants said, but based on their undisclosed, but extensive, informant history. Raising credibility issues, however, is not the same as proving perjury. Accordingly, petitioner cannot pursue a claim of false testimony.

Issue E: Prosecutorial misconduct

Petitioner's Argument

1) The prosecution failed to provide petitioner with evidence in its possession that would have greatly assisted petitioner

a) The prosecution withheld material evidence impeaching the credibility of Fink

Petitioner's Argument

Thompson claims that the prosecutor never provided Brower with an index card in the possession of the Orange County District Attorney's office that contained Fink's aliases, termed him as an unreliable operator, and described an incident where Fink escaped while assisting the police. The prosecutor failed to turn the card over to the defense or divulge the contents to the defense. This violated the discovery order imposed on the prosecution and prevented the defense from impeaching Fink's very damaging testimony.

Discussion

Even if the prosecutor had an obligation to turn over the index card, the prosecutor's omission was not the type of egregious prosecutorial misconduct that warrants habeas relief. See Greer v. Miller, 483 U.S. 756, 765 (1987) (to constitute a

due process violation, a prosecutor's misconduct must be sufficiently outrageous so as to deny the defendant a fair trial).

b) Michael Keough

Petitioner's Argument

Prior to Thompson's conviction, the prosecution interviewed inmate Michael Keough. Keough told the prosecutor that Leitch told him that he murdered Fleischli and set it up to look like Thompson did it. The prosecution never provided this information to the defense.

Discussion

The absence of information from yet another jailhouse informant did not render petitioner's trial fundamentally unfair. Moreover, Keough did testify for the defense at petitioner's motion for a new trial, though his credibility was called into question by Leitch's mother who testified for the prosecution. In any event, the trial judge was unmoved by Keough's testimony. This Court sees no reason to differ with the views of the trial judge who presided over the entirety of the case.

2) The prosecutor knowingly presented false testimony at petitioner's trial

Petitioner's Argument

Petitioner argues that the prosecution knowingly presented the false testimony of a) Tracy Leitch, b) John Del Frate, c) Edward Fink, and d) Deputy Sheriff Coder.

Discussion

In an order dated December 18, 1991, the Court found that Thompson waived sub-claim (d) regarding Coder because he

failed to exhaust the claim in state court after the Court gave him an opportunity to do so. In any event, petitioner has not demonstrated that Coder's testimony was false.

As discussed elsewhere in this Order, petitioner has failed to demonstrate that Fink and Del Frate actually provided false testimony. Instead, petitioner has shown the Court that evidence was available that cast doubt on the credibility of the informants. Because there is no evidence that the testimony was false, the prosecutor cannot be held responsible for presenting false testimony. (See claim D, above.)

As for Tracy's testimony, the jury learned that her testimony was false. Therefore, even if the Court assumes that Jacobs knew that Tracy's testimony was false when he presented it (a dubious assumption given the availability of the tape-recording refuting her testimony), there is no chance that her perjured testimony affected the outcome of the trial. See Endicott, 869 F.2d at 455 (when a prosecutor knowingly presents false testimony, the conviction will be set aside only if there is "a reasonable likelihood that the false testimony could have affected the jury verdict.")

3) The prosecutor made improper comments during closing arguments at both the guilt and penalty phases

a) Prosecutor's comments on defense counsel's arguments to the jury

Petitioner's Argument

The prosecutor improperly commented on Brower's wrongful disclosure that he did not want Thompson to take the stand by saying to the jury that Brower would not ask them to believe Thompson's testimony or even comment on it.

Facts from the Transcripts

During his guilt phase closing, Jacobs stated, "Mr. Brower probably will not spend a lot of time asking you to believe the defendant's version, that he slept through Miss Fleischli's murder." [RT 20/2560]

Discussion

In an order dated December 18, 1991, the Court found this claim to be procedurally barred. Subsequent briefing by Thompson has not convinced the Court that there are legal bases for disregarding the bar. Nevertheless, for completeness and to avoid piecemeal litigation, the Court also addresses and denies the claim on the merits.

Nothing in Jacobs' statement indicates that he was referring to Brower's desire that petitioner not testify. To this Court, Jacobs appears to be commenting on, and emphasizing, the improbability of petitioner's story, rather than reflecting on Brower's actions. In fact, immediately after making this statement, Jacobs went through petitioner's testimony and highlighted the inconsistencies and inaccuracies. That is a fair and permissible tactic in closing argument and one that cannot fairly be connected to the judge's comments in front of Jacobs about Brower's desire not to have petitioner testify.

b) Prosecutor's comments about petitioner's lack of remorse was improper

Petitioner's Argument

During the penalty phase, the prosecutor commented that Thompson failed to express remorse and urged the jury to

consider that in determining the sentence.[38] This violated Thompson's right not to testify at the penalty phase.

Discussion

In an order dated December 18, 1991, the Court found this claim procedurally barred. Subsequent briefing by Thompson has not convinced the Court that there are legal bases for disregarding the bar. Nevertheless, for completeness and to avoid piecemeal litigation, the Court also addresses and denies the claim on its merits.

"While it is proper for the prosecution to address the defense's arguments, comment is impermissible if it is manifestly intended to call attention to the defendant's failure to testify, or is of such a character that the jury would naturally and necessarily take it to be a comment on the failure to testify." Lincoln v. Sunn, 807 F.2d 805, 809 (9th Cir. 1987). Here, the prosecutor did not comment directly, or even indirectly, on Thompson's decision not to testify at the penalty phase. The focus of the argument was on the mitigation evidence presented by Thompson. That evidence, not Thompson's silence, failed to demonstrate Thompson's remorse.

In addition, the jury had no basis for believing that the prosecutor was referring, even implicitly, to Thompson's silence because Thompson was not the only person who could have

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38. The prosecutor stated:

> It would seem, in considering pity and mercy, that at least before we even considered that, we'd want to see, at least, some remorse from a defendant for his crimes. And what remorse have we heard about from Mr. Thompson? We had two psychologists testify, two relatives, two girlfriends. Not one thing has been said to indicate that that man has a sign of remorse for what he did.

[RT 23/2899]

testified about his remorse. See e.g. Johnson v. Texas, 125 L.Ed.2d 290, 299 (1993) (defendant's father testified about son's remorse); Harris v. Vasquez, 949 F.2d 1497, 1503 (9th Cir. 1991) (deputy sheriff testified about defendant's remorse). In sum, the prosecutor's comments on the mitigation evidence were appropriate closing argument, as were his comments on lack of remorse.

Issue J: The prosecutor improperly commented on defense counsel's argument to the jury

Petitioner's Argument

Brower told the prosecutor during trial that Thompson was testifying against his advice. The prosecutor then told the jury that Brower would not ask them to believe Thompson's testimony.

Discussion

This issue is denied for the reasons set forth in the discussion of claim E(3)(a).

Issue P: Prosecutors argument at penalty phase about Thompson's lack of remorse violated his right not to testify

Petitioner's Argument

When Thompson did not testify at the penalty phase, the prosecutor argued that Thompson failed to show any remorse. This comment violated Thompson's right not to testify. Moreover, the prosecutor's comment rendered Thompson's death sentence unfair because silence does not necessarily equal no remorse.

Discussion

This claim is denied for the reasons set forth in the discussion section for issue E(3)(b).

Issue Z: Prosecutorial misconduct for failing to correct the perjurious testimony of prosecution witness Del Frate

Petitioner's Argument

The prosecutorial misconduct issue is basically the flip side to the ineffective assistance of counsel claim raised in issue Y, above. Thompson contends that the prosecutor knew or should have known that Del Frate was lying about the number of previous felony convictions, the number of pending charges, and Del Frate's incarceration with Leitch.

Discussion

As discussed above in issue Y, Thompson has not demonstrated that Del Frate committed perjury. Any error attributed to Del Frate's recitation of his criminal history was due to failures by the questioner to pin down specific facts, not to Del Frate's false statements of fact. See United States v. Schulman, 817 F.2d 1355, 1361 (9th Cir. 1987) (no perjury when the government's attorney fails to pin down the specifics of the witness's testimony). Because Del Frate did not perjure himself, the prosecutor cannot be faulted for failing to expose the perjury.

F. EVIDENTIARY ISSUES

Issue K: Improper admission of photographs of Fleischli

Petitioner's Argument

Over Brower's objections, the prosecutor was allowed to introduce a photo of Fleischli alive and a series of pictures of her in death. The death photos were excluded at Leitch's trial as too inflammatory. In Thompson's trial, the prosecutor was allowed to publish three of the death photos to the jury during his closing argument.

Discussion

Federal habeas corpus relief is not available for state law errors arising from the improper admission of evidence. Estelle v. McGuire, 116 L.Ed.2d at 396. Indeed, "failure to comply with the state's rules of evidence is neither a necessary nor a sufficient basis for granting habeas relief." Jammal v. Van De Kamp, 926 F.2d 918, 919 (9th Cir. 1991). Here, the California Supreme Court found that the admission of the photographs was not error. See Thompson, 45 Cal.3d at 114-116. The photos demonstrated the manner in which Fleischli was killed and the condition of her body when she was found, including her clothing and the wrappings around her body. And, even if the admission of one or more of the photographs was erroneous, the error did not render Thompson's trial fundamentally unfair. See Bueno v. Hallahan, 988 F.2d 86, 87 (9th Cir. 1993) (" A state court's evidentiary ruling is grounds for federal habeas corpus relief only if it renders the state proceeding so fundamentally unfair as to violate due process").

Issue F: Sixth Amendment violation in admission of Fleischli's hearsay statement on the night she was murdered that she feared Thompson would kill her

Petitioner's Argument

At the time Fleischli's statement was admitted, the judge give a limiting instruction that the statement could only be considered as to the rape charge. Later, however, the judge instructed the jury that it could consider the statement for the murder charge also. The prosecutor mentioned the statement three times in closing argument.[39] Petitioner now argues that the admission of the hearsay statement violated his right to confrontation and his right to a fair trial.

Discussion

Any contention that the statement was improperly admitted under California law must fail since federal habeas relief is not available for errors of state law. See Estelle v. McGuire, 502 U.S. 62, 116 L.Ed.2d 385, 396 (1991). Moreover, the California Supreme Court found the admission to be proper. See Thompson, 45 Cal.3d at 105. The federal court cannot reexamine a state court's interpretation of state law. McGuire, 116 L.Ed.2d at 396.

Thompson, however, suggests that the admission violated constitutional norms because the introduction of hearsay statements that do not fall within the limited exceptions to the hearsay rule violates the right to confrontation and the right to

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39. Petitioner also argues that the statement was a crucial part of the prosecution's case because the jury requested that it be reread. This argument is only partially correct. What the jury requested was the complete transcripts of the testimony of Tracy, Kashani, and Thompson. [CT V/1664]. The jury did not single out Fleischli's statement for rehearing.

cross-examination. Thompson's argument misses the mark. After the defense objected to the statement on hearsay grounds, the Court admitted the statement for the sole purpose of determining Fleischli's state of mind regarding the rape allegation. Thus, the admission was permissible on nonhearsay grounds. See California Evidence Code § 1250. This forecloses any argument that the admission violated the rights to confrontation and cross-examination or the right to due process.

The error occurred when the court instructed the jury that it could consider Fleischli's expressed fear of Thompson in assessing the murder count. A jury instruction error raises a different constitutional concern: "whether the ailing instruction by itself so infected the entire trial that the resulting conviction violates due process." Cupp v. Naughten, 414 U.S. 141, 147 (1973). In assessing the harm caused by an erroneous jury instruction, the reviewing court must not consider the instruction in isolation, but must consider it in the context of all the other instructions, the testimony, the exhibits, and the arguments of counsel. Id.

In this case, a review of other relevant events in the trial is informative. Prior to Tracy's original testimony about Fleischli's statement, the court gave the following limiting instruction:

> You are not to consider the following testimony as proof of the truth that the murder occurred or that defendant committed such killing. You may consider it only for a determination of the state of mind of the victim, Ginger Fleischli, as it regards a rape and as it may negate a consensual sex act. [RT 10/1598]

The judge then repeated the last sentence and added, "That's the only purpose for this, and it's the only use you can put it to in your deliberations." [Id.]

Neither the prosecutor nor Brower mentioned Fleischli's statement during closing argument. In rebuttal argument, however, the prosecutor mentioned Fleischli's comment three times. The first time the prosecutor repeated the statement, he was discussing Tracy's perjury and suggesting that Thompson perjured himself much more than Tracy. [RT 20/2644-2645] The prosecutor mentioned the statement a second time when he was listing the evidence that Brower neglected to mention in his argument. [RT 20/2647] Nothing in the prosecutor's argument suggested that he was listing evidence of the murder as opposed to evidence of the rape, a proper use of the statement. In fact, the mention of Fleischli's statement occurred immediately after the discussion of Fleischli's cuts and bruises, evidence going to the rape and not the murder. The final reference came as the prosecutor characterized Fleischli's statement as evidence that Leitch would put Thompson up to the murder. [RT 20/2648-2649] Thus, contrary to Thompson's argument, the prosecutor never argued that Thompson must be the murderer because Fleischli wondered out loud whether Leitch would have Thompson kill her.

A number of other jury instructions are also significant to this analysis. First, the judge cautioned the jury not to single out any particular sentence or instruction and ignore all others. [RT 20/2652] Second, the judge reminded the jury about his previous limiting instructions:

> Certain evidence was admitted for a limited purpose. At the time this evidence was admitted you were admonished that it could not be considered by you for any purpose other than the limited purpose for which it was admitted. You are again instructed that you must not consider such evidence for any purpose except a limited purpose for which it was admitted. [RT 20/2658]

Third, in discussing the evidentiary factors to consider on the murder charge, the judge included that Thompson never expressed any animosity, ill will, or intent to harm Fleischli and the fact that prior to Fleischli's death she expressed a fear of physical harm from Leitch. [RT 20/2669-2670]

When the Court views the erroneous jury instruction in context, it finds that Thompson's due process rights were not violated. While the jury instruction contradicted the earlier limiting instruction, there were other instructions that supported the earlier limiting instruction. On balance, the Court finds no reasonable likelihood that the jury took that one erroneous component of a much lengthier instruction and rejected all the other instructions limiting the use of Fleischli's statement to the rape charge. See McGuire, 116 L.Ed.2d at 399 (the proper test for reviewing an ambiguous jury instruction is whether there is a reasonable likelihood that the jury has applied the challenged instruction in an unconstitutional manner).

Issue G: Evidence of Thompson's planned killings in connection with the Southeast Asia trip

Petitioner's Argument

During the prosecution's case-in-chief, Obert testified that Thompson was going to get a boat to go to Southeast Asia by killing a boat owner's son. Once Thompson had the boat, he was going to sell Asian refugees passage on the boat and then kill the refugees once they were aboard. Though Brower objected to the testimony, it was not until the next day that the prosecutor admitted that the evidence was inadmissible, and the judge had the testimony stricken. The judge refused to declare a mistrial, noting that people often state plans without any intention of carrying them out.

Later, when Thompson testified, he mentioned the Southeast Asia plans in response to questions by Brower. This

allowed the prosecutor to inquire about any plans Thompson had about killing to fulfill the plans for the Asia trip. When Thompson denied any plans to kill, the prosecutor called Obert as a rebuttal witness and the testimony eventually came in that way.

Although initially a limiting instruction was given directing the jury to consider the testimony only for impeachment, a later instruction allowed the jury to consider it on the murder charge also. Petitioner contends that the admission of this irrelevant and prejudicial testimony rendered his trial fundamentally unfair.

Discussion

As with issue F, above, the problem lies not in the admission of the evidence, but in the conflicting jury instructions regarding the purpose of the admission. Petitioner's threats to kill anyone who got in the way of his trip to Southeast Asia were admissible for motive. The prosecution's theory was that petitioner killed Fleischli to prevent her from reporting the rape. Getting arrested for raping Fleischli would interfere with petitioner's travel plans. As for threatening to kill to get the boat, the instructions regarding admission were inconsistent: one was the limiting instruction allowing the evidence to be considered for the purpose of impeaching petitioner; the other was the instruction allowing the evidence to be considered on the murder charge.

This Court has reviewed the totality of the instructions and argument and finds, as with claim F, above, that when viewed in context, the erroneous jury instruction regarding petitioner's Southeast Asia plans was not of constitutional dimension.

G. PENALTY PHASE JURY INSTRUCTIONS

Issue Q: Improper use of statutory factor (b)

Petitioner's Argument

The prosecutor urged the jury to consider Thompson's plans to kill in furtherance of his Asia plans under statutory factor (b)[40] even though (b) refers only to actual crimes of violence. In fact, since Thompson had no prior criminal record, factor (b) should have been viewed as a mitigating factor.

Facts from the Transcripts

At the outset of his penalty phase closing argument, Jacobs went through each statutory factor and discussed what evidence, if any, was applicable to that factor. After quoting factor (b), Jacobs said:

> The only other evidence that we have presented in the guilt phase about other acts of violence would be the defendant's plan to kill anyone who got in his way or the testimony we've heard from Mr. Del Frate about the defendant's plan to kill the codefendant, Mr. Leitch. [RT XXIII/2886]

No other mention of the Southeast Asia testimony was made in the prosecutor's 18-page closing argument.

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40. Statutory factor (b), as read by the trial court, allows the jury to consider, if applicable: "The presence or absence of criminal activity by the defendant which involved use or attempted use of force or violence or the expressed or implied threat to use force or violence." [RT XXIII/2955]

Discussion

The prosecutor erred in arguing that Thompson's plan to kill as part of his Southeast Asia plan was an aggravating factor under factor (b) because acts or threats of violence offered under factor (b) "require proof of conduct constituting commission of an actual crime." See Thompson, 45 Cal.3d at 127. The error, however, is not constitutional in nature.

Prosecutorial misstatements of law rarely rise to the level of constitutional infirmity:

> [A]rguments of counsel generally carry less weight with a jury than do instructions from the court. The former are usually billed in advance to the jury as matters of argument, not evidence, and are likely viewed as the statements of advocates; the latter, we have often recognized, are viewed as definitive and binding statements of the law. [citations omitted] Arguments of counsel which misstate the law are subject to objection and correction by the court. [Citation omitted.] This is not to say that prosecutorial misrepresentations may never have a decisive effect on the jury, but only that they are not to be judged as having the same force as an instruction from the court. And the arguments of counsel, like the instructions of the court, must be judged in the context in which they are made.

Boyde v. California, 494 U.S. 370, 108 L.Ed.2d 316, 332 (1990).

Given the proper instructions given by the court, and given the brief argument made by the prosecutor, petitioner cannot demonstrate that the prosecutor's argument rendered his trial fundamentally unfair.

Issue R: Penalty instructions to jury prevented an individualized sentencing determination

Petitioner's Argument

The judge instructed the jury that if aggravating factors outweighed mitigating factors, then they must return a death verdict. The judge did not tell the jury that it must be convinced beyond a reasonable doubt, nor did he instruct that it must find that death is appropriate.

Discussion

The Constitution does not require a reasonable doubt instruction in this situation. See Zant v. Stephens, 462 U.S. 862, 874 (1983) (noting, without disapproval, that in Georgia, the jury is not instructed to balance aggravating and mitigating factors under any special standard). Indeed, the Court went on to state, "the Constitution does not require a State to adopt specific standards for instructing the jury in its consideration of aggravating and mitigating circumstances . . . ." Id. at 890.

> Similarly, the Ninth Circuit has observed:
>
> The United States Supreme Court has never stated that a beyond-a-reasonable-doubt standard is required when determining whether a death penalty should be imposed. . . . If the Supreme Court had intended for the burden in death-penalty cases to vary from the standard burden in all other criminal sentencing, it would have said so in one of the many modern cases dealing with the death penalty.

Harris v. Pulley, 692 F.2d 1189, 1195 (9th Cir. 1982), reversed on other grounds, 465 U.S. 37, 79 L.Ed.2d 29 (1984).[41] See

41. Despite the reversal, the United States Supreme Court noted, without disapproval, that the Ninth Circuit found there was no constitutional requirement that the appropriateness of the death sentence be established beyond a reasonable doubt. Pulley v. Harris, 465 U.S. 37, 79 L.Ed.2d 29, 34 n.4 (1984).

also Ford v. Strickland, 696 F.2d 804, 817-818 (11th Cir.) (en banc) (the requirement that aggravating factors outweigh mitigating factors for a death sentence to be imposed is not an element of the crime of capital murder; the weighing of factors is not susceptible to proof by either party), cert. denied, 464 U.S. 865 (1983).

As for Thompson's challenge to the mandatory ("shall impose") nature of the sentencing instruction, the United States Supreme Court has not found any constitutional infirmity in jury instructions which, on the surface, suggest the mandatory imposition of a death sentence. See Blystone v. Pennsylvania, 494 U.S. 299, 108 L.Ed.2d 255 (1990) (upholding a jury instruction stating "the verdict must be a sentence of death if the jury unanimously finds at least one aggravating circumstance . . . and no mitigating circumstance or if the jury unanimously finds one or more aggravating circumstances which outweigh any mitigating circumstances"); Boyde v. California, 494 U.S. 370, 108 L.Ed.2d 316 (1990) (the "shall impose" language of the California death penalty statute does not violate the Constitution).

Thus, Thompson's arguments about the sentencing instructions are without merit.

Issue T: Trial judge's refusal to instruct that Thompson's potential for rehabilitation can be a mitigating factor, while allowing the prosecutor to argue that Thompson might kill again

Petitioner's Argument

The trial judge refused Thompson's proposed jury instruction that his potential for rehabilitation and to lead a useful and meaningful life while incarcerated can be considered a factor in mitigation.[42] At the same time, the prosecutor questioned whether Thompson might kill again.[43]

Discussion

Thompson is not contending that he was barred from presenting relevant evidence in mitigation. Instead, he is objecting to the denial of a jury instruction modifying the statutorily mandated factors for a penalty phase jury to consider in deciding the proper sentence. "An omission, or an incomplete instruction, is less likely to be prejudicial than a misstatement of the law." Henderson v. Kibbe, 431 U.S. 145, 155 (1977). This case is no exception. Thompson has not demonstrated that the omission of the instruction was in any way prejudicial because he presented no evidence of his potential for

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42. The proposed language was part of a lengthy jury instruction adding six factors to the statutory factors set forth in California Penal Code § 190.3 for consideration by the penalty phase jury. [CT V/1701-1702]

43. What the prosecutor asked, rhetorically, was:

> And so for one single, isolated, unprovoked, uncalled for atrocity, should this man be sentenced to the ultimate punishment? Or should he be spared because there's just one atrocity and not two, or not three? Shall we ask ourselves if even in prison can we be sure that he won't kill again? [RT 23/2900] (Emphasis added.)

rehabilitation. The prosecutor's very brief rhetorical question, not based on any evidence, hardly invited rebuttal in the form of a rehabilitation instruction. The denial of the lengthy modification instruction was not error.

Issues U & V: Preclusion of evidence and instructions regarding the nature, effect, and cost of the two penalties

Petitioner's Argument

At trial, Thompson requested an instruction that the jury cannot consider deterrence or monetary costs to the state in determining the appropriate sentence. The trial court agreed that the defense was entitled to the instruction. Through inadvertence, however, the instruction was never given. Thompson never objected to the omission.

In addition, the court refused to allow the defense to present evidence that life without the possibility of parole is less expensive and that death is not a deterrent. Similarly, the trial court refused to allow the defense to present evidence about how a death sentence is carried out and about how prisoners sentenced to life without the possibility of parole are housed and treated. The Court also refused to instruct the jury that it must assume that whatever sentence it decides upon will be carried out.

Discussion

Thompson's claims raise constitutional questions only if the issues --deterrence, cost, method of carrying out death, and housing and treatment of prisoners serving life without the possibility of parole-- are proper subjects of consideration by the penalty phase jury. The oft-cited rule is:

> [T]he Eighth and Fourteenth Amendments require that the sentencer . . . not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.

Eddings v. Oklahoma, 455 U.S. 104, 110 (1982) (emphasis in original) (citation omitted).

The type of evidence which Thompson wanted to place before the jury did not bear on Thompson's character or record, nor did it pertain to the circumstances of the crime. Accordingly, the trial court's refusal to allow the evidence to be presented did not violate any constitutional limitations on death penalty verdicts. See Spaziano v. Florida, 468 U.S. 447, 461 (1984) (deterrent value of any sentence is primarily a consideration for the legislature); Harris v. Pulley, 692 F.2d 1189, 1204 (9th Cir. 1982) (no error in refusing to admit testimony on how the death penalty is carried out because it does not bear on the defendant's character, record, or circumstances of the offense), reversed on other grounds, 465 U.S. 37 (1985); Shriner v. Wainwright, 715 F.2d 1452, 1456 (11th Cir. 1983) (no error in refusing testimony on how electrocutions are carried out), cert. denied, 465 U.S. 1051 (1984).

Thompson's arguments regarding public misperceptions about the death penalty are unpersuasive. The Constitution mandates individual sentencing. General arguments about the moral and economic advantages and disadvantages of the death penalty do not assist a jury in making the individualized determination required by the Eighth and Fourteenth Amendments. The absence of such evidence or instruction, therefore, does not render a penalty determination unreliable.

Issue AA: Petitioner's capital sentence was imposed under an unconstitutionally vague sentencing statute that permitted the jury to render the verdict in an arbitrary, unreliable and unfair manner in violation of the Eighth and Fourteenth Amendments

Petitioner's Argument

Petitioner challenges various aspects of California's death penalty statute:

(1) the statute fails to delete inapplicable sentencing factors;

(2) the statute fails to specify whether the sentencing factors should be considered aggravating or mitigating;

(3) the statute fails to require written findings by the jury regarding aggravating factors found by the jury;

(4) the statute does not require the prosecution to prove beyond a reasonable doubt that aggravating factors outweigh mitigating factors;

(5) the statute does not require the prosecution to prove the existence of aggravating factors beyond a reasonable doubt;

(6) the sentencing factors, individually and collectively, fail to guide the sentencer's discretion and create an impermissible risk of vaguely defined, arbitrary and capricious selection of individuals upon whom death is imposed;

(7) the rape-murder special circumstances on its face and as applied to petitioner failed to meaningfully narrow the categories of death-eligible murders and is unconstitutionally vague and overbroad.

Discussion

The Court granted petitioner's exceedingly late motion to amend the petition to add this claim based on petitioner's representation that the United States Supreme Court had granted certiorari on an identical claim and would be deciding the merits of the claim during the 1994 term. Indeed, many of petitioner's sub-claims were rejected in Tuilaepa v. California, 114 S.Ct. 2630 (1994).[44] In addition, the United States Supreme Court has previously approved of California's death penalty scheme. See California v. Brown, 479 U.S. 538, 540 n.* (1987).

H. MISCELLANEOUS ISSUES

Issue H: Use of Jailhouse Informants

Petitioner's Argument

This claim focuses on the unreliability of jailhouse informants and the prevalence of informant testimony in death penalty cases. Thompson notes that Los Angeles District Attorney's office no longer permits informant testimony to be used unless the defendant's alleged statements to the informant can be independently verified. Even then, a district attorney must have official approval before using the informant's testimony.

44. To the extent that any of petitioner's sub-claims were not addressed in Tuilaepa, the Court declines to consider them. The Court granted the motion to amend solely because doing so would not require any additional work by the parties or the Court. Petitioner, in fact, has never submitted any points and authorities supporting his sub-claims, relying instead on Tuilaepa. The Court declines to conduct petitioner's research to resolve any claims remaining after Tuilaepa.

In this case, the judge did not give an instruction that the testimony of jailhouse informants should be viewed with distrust. The prosecutor told the jury that the testimony of the informants was dispositive of any issues of fact left in the case.

Discussion

Petitioner appears to be arguing that apart from any other informant-related claim raised in his petition, the use of informants at his trial was a per se violation of his Due Process rights. Not surprisingly, petitioner provides no legal citations for this novel proposition. Except under limited circumstances not applicable here, "habeas corpus cannot be used as a vehicle to create new constitutional rules of criminal procedure." Teague v. Lane, 489 U.S. 288, 316 (1989). The applicability of Teague is a threshold question in every habeas corpus case. Caspari v. Bohlen, ___ U.S. ___, 114 S.Ct. 948, 953 (1994). A court may apply Teague even if the state does not argue Teague. Id. This Court finds Teague to be applicable and will not address the merits of this claim.[45]

45. If petitioner was merely intending to challenge the absence of a cautionary instruction regarding the testimony of jailhouse informants, that claim is also unavailing. A court does not have a constitutional obligation to instruct sua sponte on the unreliability of informant testimony. See United States v. Bosch, 914 F.2d 1239, 1247 (9th Cir. 1990). In assessing the need for such an instruction, a reviewing court should consider whether the informant's testimony was corroborated, whether other credibility instructions were given, and whether defense counsel discussed credibility in closing argument. Id. at 1247-1248. Here, the forensic evidence presented at trial corroborated the rape testimony of the informants. In addition, the trial court gave the jury general credibility instructions and Brower argued vigorously about the informants' lack of credibility.

Issue I: <u>The trial judge prejudged the new trial motion and motion for modification of sentence and was biased against Thompson</u>

<u>Petitioner's Argument</u>

Thompson believes the trial judge was biased against him for the following reasons:

a) The judge met with the jury in chambers and without counsel present following the verdict at the penalty phase. During the meeting, the judge told the jury that he agreed with their verdict and that they had done the right thing. The judge later denied Thompson's motion for a new trial and motion for modification of the sentence.

b) Following the California Supreme Court's affirmance of Thompson's conviction and sentence, the judge told a newspaper that "There is a God" and "That is good news" and that he hoped the execution would go forward because Thompson was a deserving soul.

c) Following the Supreme Court's denial of certiorari, the judge told the newspaper, "He deserves to go . . .Leitch should be sitting there beside his buddy when they drop the cyanide."

Thompson also notes inconsistent statements and rulings made by the judge between Thompson's trial and Leitch's trial.

<u>Facts from the Trial Transcript</u>

After the jury returned a verdict of death, the judge told the jury, "It's my custom, in cases of this nature, to receive the jurors who have deliberated on the case in my chambers, where I'll answer any questions you might have on the entirety of the case that I can answer." Indeed, after releasing the jurors from

the admonishment not to talk to anyone or read anything about the case, the judge invited the jurors into chambers.

Sometime after this meeting, Thompson's new attorney, Robert App,[46] moved to disqualify Judge Fitzgerald for meeting ex parte with the jurors, while Thompson's automatic motion for modification and motion for new trial were pending. At a hearing before a different judge, App expressed concern about what might have been said at the meeting and how the meeting might affect the trial judge's ability to rule on the motions in an impartial fashion. App sought an evidentiary hearing where the jurors and judge would testify about the what transpired at the meeting. The judge agreed. The judge limited the hearing to what was said at the meeting.[47]

Eight jurors and the trial judge testified at the evidentiary hearing. At the conclusion of the hearing, App stated:

> [T]he defense has been unable to obtain service on four jurors. I have no basis for believing that the testimony of those jurors would be any different than what we have heard so far. On the basis of the testimony here today, I would ask leave to withdraw the motion to disqualify.

After consulting with his attorneys, Thompson joined in the motion to withdraw the motion to disqualify Judge Fitzgerald.

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46. Brower had been relieved by this time at Thompson's request.

47. The meeting with the jurors and the judge took place on November 17, 1983. The evidentiary hearing about the meeting took place almost 7 months later, on June 22, 1984.

Discussion

Nothing in the testimony of the jurors or the judge indicates any bias on the part of the judge. Indeed, the lack of bias was apparently so obvious that Thompson withdrew his motion to disqualify the judge without even waiting for a ruling. This Court finds no basis for reconsidering a claim that was explicitly waived by petitioner, with good reason, during his motion for a new trial.

As for the other judicial bias issues, the judge's post-appeal comments do not lead to the conclusion that Thompson's trial was somehow fundamentally unfair. Instead, the comments reflect the feelings of a judge who sat through the trials of both Thompson and Leitch and formed some definite feelings about the evidence presented. By the time the judge made his comments, his role in the case had long ago ended.

Issue M: The California Supreme Court refused to consider newly discovered evidence presented in Thompson's state habeas

Petitioner's Argument

The California Supreme Court failed to consider the following new evidence presented in Thompson's first state habeas petition:

1) Newly discovered evidence admitted at Leitch's trial-

Kashani testified at Leitch's trial that Fleischli declined his offer of a ride home because Leitch and Tracy were going to pick her up.

Officer Ishmael testified at Leitch's trial that he assisted Fleischli remove her things from the apartment just a few days before the murder because Leitch had been violent and had threatened to kill her and she was fearful.

Tracy testified at Leitch's trial that on the night following Fleischli's murder, Leitch was "a little uptight" and "concerned." She also expressed her dislike of Thompson.

Obert testified at Leitch's trial that he had never seen Thompson with Leitch's fishing knife.

2) Newly discovered evidence admitted at the hearing on petitioner's motion for a new trial

Leitch told a jail inmate, Keough, that he killed Fleischli while Thompson slept and set it up so it looked like a rape. Leitch told Keough that he killed Fleischli and that Tracy helped him get rid of the body.

Discussion

Errors in state post-conviction process are not cognizable on federal habeas corpus. See Franzen v. Brinkman, 877 F.2d 26 (9th Cir.), cert. denied, 493 U.S. 1012, (1989). Even if the claim was reviewable by this Court, it is without merit. The new evidence cited by petitioner did not and does not undermine the reliability of petitioner's convictions.

Issue S: Trial judge's use of information regarding the victim's family, its impact on them, and the victim's personal characteristics

Petitioner's Argument

The judge read and considered Thompson's probation report, which included comments by Fleischli's family, before

denying Thompson's motions for a new trial and modification of sentence. The judge also invited Fleischli's brother to make a statement to the court before it ruled on the motions, though he declined the invitation.

Discussion

Thompson has subsequently acknowledged that the Constitution does not bar the consideration of victim impact statements at the penalty phase. See Payne v. Tennessee, 501 U.S. 808 (1991). This Court agrees.

Issue W: Knowledge of some jurors that their decision was not the final penalty decision

Petitioner's Argument

The trial court refused Thompson's request that the jury be instructed that whichever penalty it selected would be carried out. At a post-penalty phase evidentiary hearing, one of the jurors, Eldon Hoover, stated that during a post-trial discussion with the jurors, the trial judge mentioned that there was a possibility of a new trial. [RT 23/3035] In response to a leading question, the juror further stated that he thought the judge had also said something along the lines that he would have the final decision of whether Thompson received life or death. [RT 23/3036] The juror did not find this particularly surprising because he believed that information was in the instructions or had somehow been told to the jury previously. [RT 23/3036] Nevertheless, the juror did not believe that the jury's verdict was in any way an advisory opinion to the judge. [RT 23/3037] Thompson contends that his death sentence is inherently unreliable because the jury's sense of responsibility was minimized.

Discussion

In Caldwell v. Mississippi, 472 U.S. 320, 323 (1985), the Court reversed a death sentence because the prosecutor argued to the penalty phase jury that it was not the actual determiner of the defendant's fate because the state Supreme Court would render the final decision in the case. The Court announced that "it is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere." Id. at 328-329. In reaching this decision, the Court emphasized not only the inappropriateness of the prosecutor's argument, but the inaccuracy of it, since appellate courts do not view the evidence or the sentencing decision in the same manner as a jury. Id. at 336.

This case, in contrast, has no such inflammatory prosecutorial argument. Indeed, Thompson has not highlighted any aspect of the trial which would give rise to even an inference that the jury's role in sentencing was minimized. That one juror may have had independent knowledge that a capital case undergoes appellate review does not render Thompson's death sentence unreliable.

Issue O: Cumulative effect of the errors on issue of guilt

Petitioner's Argument

The cumulative effects of the guilt phase rendered Thompson's trial fundamentally unfair.

Discussion

With the exception of the ineffective assistance of counsel claims for which relief was granted, the remaining claims do not

provide a basis for federal habeas relief either individually or collectively.

IV. CONCLUSION

The prosecution did not present strong evidence that Fleischli was raped or that Thompson was the perpetrator of the rape. What evidence was presented was problematic and vulnerable to attack. Nevertheless, Brower failed to mount a meaningful attack against the medical testimony or the informants. Brower's omissions cumulatively violated Thompson's Sixth Amendment right to the effective assistance of counsel on the rape charge and the rape special circumstance .

Thompson's petition for writ of habeas corpus is GRANTED as to the rape charge and the rape special circumstance.

Thompson's petition for writ of habeas corpus is DENIED as to the murder charge.

Thompson's petition for writ of habeas corpus is DENIED as to the sentence.[48]

As a result of the granting of the writ as to the special circumstance, Thompson's death sentence is VACATED.

The state of California has 60 days from the entry date of this Order to commence new special circumstance proceedings against Thompson or to resentence Thompson in accordance with this Order.

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48. The Court is aware that the granting of the writ as to the special circumstance necessarily vacates the sentence. To conserve judicial resources and prevent piecemeal litigation, however, the Court has addressed every claim raised by petitioner in this Court. The Court has found that every claim involving the penalty phase and sentencing is without merit.

Before concluding, the Court wishes to express its view that the ends of justice would not be served by retrying petitioner on the rape charges. While the Court has found that petitioner's remaining claims do not rise to to the level of constitutional error, many of them nevertheless leave the Court with an unsettling feeling. The disparate convictions and sentences of Thompson and Leitch, for example, while legally permissible, are troubling to this Court given the intensity of public perceptions in these cases and the deficiency of certainty regarding relative culpabilities. These concerns should be carefully considered by the State when deciding if society would best be served by retrying these charges, now almost 14 years old, and perhaps sparking another decade or more of judicial review.

IT IS SO ORDERED.

Dated: March 28, 1995

RICHARD A. GADBOIS, JR.,
United States District Judge

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

THOMAS MARTIN THOMPSON,
Petitioner--Appellant--Cross-Appellee,

v.

ARTHUR CALDERON, Warden
of the California State Prison at San Quentin,
Respondent--Appellee--Cross-Appellant.

OPINION
Filed June 19, 1996

BEEZER, Circuit Judge:

Arthur Calderon, as warden and on behalf of the State of California, hereinafter the "State," appeals the district court's partial grant of Thomas Martin Thompson's petition for a writ of habeas corpus. The district court's judgment set aside Thompson's 1983 conviction in California state court for the rape of Ginger Fleischli. Thompson appeals the district court's partial denial of the petition challenging his state court conviction for Fleischli's murder and imposition of a sentence of death. The district court had jurisdiction under 28 U.S.C. § 2254. We have jurisdiction pursuant to 28 U.S.C. §§ 1291 and 2253. We reverse the partial grant of Thompson's petition as to the rape charge. We affirm the district court's partial denial of Thompson's petition as to the murder conviction and penalty phase.

I

The evidence, both oral and physical, considered in the state trial court, the decisions made in state appellate proceedings and the matters considered in federal district court are reflected in the record before us.

A.

The state court trial record reveals the evidence presented for and against Thompson.

A California state court jury returned guilty verdicts against Thompson on one count of first-degree murder (Cal. Penal Code §§ 187, 189) and one count of forcible rape (Cal. Penal Code §§ 261(2)) in connection with the death of Ginger Fleischli. The jury also found true the special circumstance of murder during the commission of a rape (Cal. Penal Code § 901-2(a)(17)(iii)).

In a separate proceeding, David Leitch was found guilty of the second degree murder of Fleischli.

During the summer of 1981, Thompson occupied an apartment with David Leitch in Laguna Beach. Not long before, Ginger Fleischli, the 20-year-old victim, had moved out of the same apartment. Fleischli, who had been sexually involved with Leitch, moved in with Leitch's ex-wife, Tracy Leitch.

On September 11, 1981, Fleischli, Tracy Leitch, David Leitch and Thompson met at a pizza parlor on Balboa Island. They removed to the Sandpiper Inn on Pacific Coast Highway in Laguna Beach, where Thompson and Fleischli remained drinking after David and Tracy Leitch departed. Afshin Kashani joined Fleischli and Thompson at about 9:30 p.m. The three drank and danced, both at the Sandpiper and at a nearby bar,

the Boom-Boom Room. Kashani and Thompson also smoked some of Kashani's hashish.

At about 1 a.m., Thompson, Kashani and Fleischli walked back to the apartment occupied by Thompson and Leitch. Kashani and Thompson smoked more hashish. Fleischli departed at about 2 a.m. to purchase some soda at a nearby liquor store. According to Kashani, Thompson indicated to him in Fleischli's absence that he wanted to have sex with Fleischli that night and that Kashani could have her after Thompson left the country.[1]

At trial, Kashani testified that after he departed, he realized that he had forgotten his cigarettes and returned to the apartment. There, a nervous Thompson handed him the cigarettes through the door. Kashani looked for Fleischli at the liquor store; not seeing her, he went home.

Tracy Leitch testified that she went to the apartment the next morning and asked Thompson where Fleischli was. She further testified that he told her that Fleischli had left from the inn with Kashani.

Tracy Leitch again spoke with Thompson that evening about Fleischli's whereabouts. She testified that Thompson answered using the past tense, saying that he had liked Fleischli and that she was a nice girl. The next day, Tracy Leitch filed a missing person's report with the police.

Fleischli's body was found two days later in a grove of trees near an interstate highway. Two sets of footprints appeared near the body. One print matched a wavy soled shoe worn by

1. Thompson apparently planned to leave the country in order to smuggle Southeast Asian refugees, gold, and possibly cocaine out of Thailand. The State suggested at trial that Fleischli's knowledge of this plan formed part of Thompson's motive for murder.

David Leitch. Investigators could not identify the other footprint, which was smooth.

Fleischli lay buried in dirt, wrapped in an old sleeping bag and a pink blanket that a previous tenant had left in the apartment occupied by Thompson and Leitch. Fibers from the blanket matched fibers found in David Leitch's automobile. A stain on the rope used to tie Fleischli's body matched paint from the trunk of Leitch's vehicle.

Fleischli was stabbed five times in the head near her right ear. A single-edged knife was thrust two and one half inches through Fleischli's ear, penetrated her carotid artery, and caused massive bleeding and ultimately her death. Her head was wrapped with silver duct tape, two towels, a sheet and her jacket. Investigators found her blood in the carpet at the apartment occupied by Leitch and Thompson.

Fleischli's shirt and bra were cut in front and pulled down to her elbows. She wore no shoes, socks or underwear, and her jeans were fully zipped but not buttoned. A vaginal swab revealed semen consistent with Thompson's blood type.

Before Fleischli's body was discovered, Thompson and David Leitch travelled to Mexico together. Leitch returned and was arrested. Mexican authorities located Thompson, who possessed handcuffs at the time of his arrest. Thompson initially claimed that Fleischli had left the apartment with Kashani. Thompson also told police that Fleischli had been stabbed in the head, although the media had not previously reported this information. First denying that he had sexual intercourse with Fleischli, Thompson later asserted that he and Fleischli had consensual intercourse in the apartment.

At the state trial, Dr. Richards, a forensic pathologist, testified that he found no anatomical evidence of rape. The

pathologist expressed the opinion that several bruises on Fleischli's body occurred at or near the time of her death.

A police investigator testified that one of Fleischli's bruises resembled injuries he had seen and known to be caused by handcuffs.

Two jailhouse informants, John Del Frate and Edward Fink, testified that Thompson, while in jail, confessed to committing the rape and murder.

Thompson chose to testify despite his attorney's advice to the contrary. Thompson testified that he had sex with Fleischli and then passed out and slept until the next morning. He said that he heard nothing of the murder in the small apartment. He called witnesses who testified that he was a heavy sleeper, but he himself said that he had been awakened in Mexico by the sound of police cocking the hammers of the revolvers they pointed at his head.

The jury found Thompson guilty of rape and murder.

B.

After Thompson's state appeals failed,[2] Thompson filed a petition for a writ of habeas corpus in federal court.

The district court conducted an evidentiary hearing on Thompson's claim that his attorney, Ronald Brower, provided ineffective assistance of counsel. Thompson called Dr. Irving Root, a forensic pathologist who testified that he could have

2. The California Supreme Court unanimously affirmed his convictions for rape and murder. *People v. Thompson*, 753 P.2d 37 (Cal. 1988), *cert. denied*, 488 U.S. 960 (1988). State collateral proceedings did not relieve Thompson from the state court judgment and sentence. *People v. Thompson*, No. S008382 (1989); *In re Thompson*, No. S018049 (1991).

given rebuttal evidence in the state trial. A defense investigator contacted Root in 1983, but Brower did not call Root at trial. In 1983, the investigator gave Root sixteen documents, including the autopsy report, and asked for Root's professional opinion about whether rape was likely and what kind of physical trauma is associated with rape. The district court restricted the State's cross-examination of Root concerning his expertise and possible bias.

Brower testified at the evidentiary hearing. He defended his decisions, stating that he did not emphasize the rape charge because he based the defense on Thompson's claim that he did not commit the murder. Brower testified that he had adequately rebutted the forensic evidence and that spending an inordinate amount of time on such evidence would detract from his strategy. Brower also testified that he believed that he conducted sufficient investigation and had adequately impeached the jailhouse informant testimony.

Both sides called attorney expert witnesses to support their arguments regarding ineffective assistance of counsel. One expert, Attorney James Stotler, characterized Brower's representation as high caliber. Attorney Gerald Chaleff, the other expert, termed Brower's representation ineffective and prejudicial to Thompson.

Following post-hearing briefing, the district court granted the petition in part. The court concluded that Brower's failure to impeach Dr. Richards' conclusions and to call a forensic expert, as well as his failure to impeach Fink with testimony concerning numerous prior instances where Fink had informed against others and received favors from law enforcement, rose to the level of ineffective assistance. The district court held that state trial counsel Brower prejudiced Thompson's right to a fair trial on the rape charge. The district court also faulted Brower for failing to further impeach Del Frate. The district court held

that the errors combined to produce prejudice. The State appeals this decision.

The district court rejected all of Thompson's other challenges to the murder conviction and to the death penalty phase of the proceedings. Thompson appeals this decision.

II

We are mindful of the limited role of federal courts in habeas review of state convictions.

"The role of federal habeas proceedings, while important in assuring that constitutional rights are observed, is secondary and limited. Federal courts are not forums in which to relitigate state trials." *Brecht v. Abrahamson*, 507 U.S. 619, 633 (1993) (citation omitted).

We review de novo a district court's order granting or denying a petition for a writ of habeas corpus. *Sanders v. Ratelle*, 21 F.3d 1446, 1451 (9th Cir. 1994). The district court's findings of fact are reviewed for clear error. *Bonin v. Calderon*, 59 F.3d 815, 823 (9th Cir. 1995), *cert. denied*, 116 S. Ct. 718 (1996).

This appeal presents the claimed ineffective assistance of defense counsel as a primary issue. A claim of ineffective assistance of counsel is a mixed question of law and fact which we review de novo. *Harris v. Wood*, 64 F.3d 1432, 1435 (9th Cir. 1995) (citing *Sanders*, 21 F.3d at 1451). Both the performance and prejudice components of the ineffectiveness inquiry present mixed questions which we review de novo. *Strickland v. Washington*, 466 U.S. 668, 698 (1984).

Thompson faces a "strong presumption" that counsel rendered adequate assistance and exercised reasonable

professional judgment in making decisions. *Id.* at 690. Thompson must demonstrate that counsel's performance was "outside the wide range of professionally competent assistance." *Id.* Tactical decisions of trial counsel deserve deference when: (1) counsel in fact bases trial conduct on strategic considerations; (2) counsel makes an informed decision based upon investigation; and (3) the decision appears reasonable under the circumstances. *Sanders v. Ratelle*, 21 F.3d at 1456.

Thompson must do more than show a deficiency of representation; he must also establish prejudice. He must demonstrate a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Clabourne v. Lewis*, 64 F.3d 1373, 1378 (9th Cir. 1995) (quoting *Strickland*, 466 U.S. at 694). "The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Strickland*, 466 U.S. at 686. Thompson bears the burden of showing that there is a reasonable probability that the jury would not have convicted him had defense counsel not rendered ineffective assistance.

III

The State appeals the district court's partial grant of Thompson's petition.

The district court concluded that Thompson's trial counsel, Ronald Brower, rendered ineffective assistance in defending the rape charge. The court found the ineffective assistance cumulative and prejudicial, resulting from Brower's failure to investigate, his failure to emphasize the lack of physical evidence of rape and his failure to investigate and more thoroughly cross-examine Fink and Del Frate.

A.

In finding prejudice, the district court minimized the evidence of rape and failed to account for the damage done by Thompson's own testimony.

Brower testified in these proceedings that he chose not to emphasize the rape evidence in the state trial because he sought to prove that Thompson did not commit the murder. Thompson's insistence on testifying that he did not rape Fleischli and slept through the murder played a significant part in Brower's decision to adopt this strategy.

Because we disagree with the district court's assessment of the strength of the State's rape case, we confine our review to the prejudice element of the *Strickland* test. *Cf. Williams v. Calderon*, 52 F.3d 1465, 1470 (9th Cir. 1995) (not reaching cause because petitioner had not shown prejudice), *cert. denied*, 116 S. Ct. 937 (1996). The district court inexplicably found the evidence of rape weak but the evidence of murder "overwhelming," even without the testimony of the jailhouse informants who testified to Thompson's confession to both crimes. The State presented strong evidence of rape at the state trial. This evidence overlapped substantially with the evidence of murder. The jury convicted Thompson of both charges. The nature and amount of the evidence compel us to reverse the district court's finding that Thompson had shown Brower's alleged errors to have created a reasonable probability of a different verdict.

The State presented a strong rape case during the state trial. It demonstrated the existence of semen consistent with Thompson's. On the question of consent, the condition of the body provided compelling evidence of rape. Someone had cut Fleischli's shirt and bra up the middle and pulled them down to her elbows, placing her in a position consistent with restraint during a rape. Thompson suggested at trial that someone could

have done this after killing her in order to facilitate moving her body, but the body was otherwise secured by the blanket, tape and ties. No logical inference supported exposing her breasts and restraining her in this fashion merely in order to move her dead body. Fleischli wore no shoes, socks or underwear, and her jeans had been fully zipped but not buttoned. She also suffered a severe crushing injury to her right wrist at or near the time of her death.

Most importantly, Thompson's own testimony did severe damage to his defense.[3] After having lied to police, Thompson admitted having intercourse with Fleischli that night in the apartment, and the jury did not have to believe Thompson's testimony about being sound asleep while Leitch bound, gagged and, killed the victim, all a few feet away. After the trial, the state court judge revealed the impact of Thompson's fantastic claims when he took pains to indicate on the record Brower's disagreement with Thompson's decision to testify. The trial judge stated that he wanted to leave "no one believing that defense counsel joined in the *folly* of his client testifying in my observation." (Emphasis added). The district court agreed with this assessment of Thompson's testimony, stating that it was "devastating to his defense." The district court found it "riddled with inconsistencies and outfight falsehoods," and concluded that it "no doubt affected the jury's verdict."

Having reviewed the testimony, we would go further. As in *Williams v. Calderon*, 52 F.2d at 1470, we may here eschew an inquiry into Brower's assistance in favor of a clear determination that Thompson has not shown prejudice, because his own words rank among the most damaging of the testimony presented to the jury. The district court concluded that Brower should have

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3. Thompson does not raise on appeal his claim of ineffective assistance based on Brower's alleged failure to adequately prepare him for testifying or dissuade him from testifying. Thompson himself admitted that he ignored Brower's advice.

worked harder to rebut other evidence of rape and the testimony of the informants, but this would not have rebutted the condition and position of the bra and shirt on the body, the presence of some bruising and Thompson's reluctant admission. After reviewing the opportunities that Thompson claims Brower missed, we cannot conclude that they would have made a difference in the verdict.

1.

First, we review the district court's finding of ineffective assistance based upon Brower's failure to rebut forensic evidence of rape.

Brower presented a defense theory in the state trial that Thompson had consensual sex and then Leitch bound, gagged and murdered Fleischli while Thompson slept. Counsel pursued this theory consistent with Thompson's testimony, given against Brower's advice, that he did not commit the murder or rape Fleischli. Brower stated that he did not want to emphasize the possibility of rape by spending an inordinate amount of time on the evidence of bruises. Instead, Brower sought to show that another person, David Leitch, caused the bruises and killed Fleischli while Thompson slept. The district court characterized Brower's general strategy as "flawed," and found his failure to systematically rebut each piece of medical evidence to constitute ineffective assistance of counsel.

a.

We review the areas of forensic evidence that were the focus of the district court's finding.

Prior to trial, Brower interviewed the State's pathologist, Dr. Richards, who told Brower that he had found no "anatomical evidence" of rape. The parties vigorously dispute whether "anatomical evidence" meant vaginal bruising or any

bruising. Brower testified that he asked Richards to clarify "anatomical evidence," and Richards said that he had found no bruising, cuts or discolorations suggesting rape. Brower also testified that he and Richards went over Richards' entire report, including the bruising Richards observed, and that Richards continued to repeat that the findings did not indicate rape. Brower felt that the State could not effectively impeach Richards on these points.

During his state court trial testimony, Richards noted bruises on the victim's arms, wrists, palms and legs. He testified that the photographs of the victim's body showed a "crushing injury with surrounding bruise to the right wrist." A "large recent bruise on the left elbow" also appeared at the autopsy. He characterized a bruise to the right knee as older, but placed all the other bruises at or immediately before the time of death. He ascribed the bruising to "heavy handling," perhaps by hands causing pressure. He expressed the opinion that something heavy caused the crushing injury to the right wrist.

Having discussed the bruises, Richards concluded that there was no anatomical evidence of rape. Thompson vigorously disputes the meaning of the term "anatomical evidence" as used by Richards, arguing that it meant only vaginal bruising or tearing. Richards' testimony supports the inference that by "anatomical evidence," he meant any trauma, not just trauma to the vagina. On the meaning of the bruising, he testified that bruising to parts of the body other than the vagina usually demonstrated lack of consent even more than vaginal bruising. Just after making this statement, Richards admitted on recross that, "[t]here is no anatomical evidence of rape. There is nothing to indicate it whatsoever. I would rely on the semen and sperm analysis." Richards later clarified the term "anatomical evidence" by stating: "Most of the time there is no trauma sufficient to identify at autopsy . . . there need be no evidence of injury at all with rape." He characterized the determination of rape as "a legal matter . . . out of [his] hands."

Richards' 1983 testimony indicates that he found no physical evidence of rape aside from semen.

At the evidentiary hearing in 1993, Root testified that he would have disagreed with several of Richard's conclusions.[4] Root offered the opinion that the bruises on the victim's legs occurred weeks before her death. Root ascribed the marks on the palms to lividity. He allowed that the contusion on the left hand could have occurred at the time of death, but he felt that the injury to the left wrist occurred a minimum of two days before death. He concluded that there was in fact no injury at all to the right elbow. As to the crushing injury to the right wrist, Root could not determine a time frame, but he testified that he saw no injuries consistent with his prior observations of injuries caused by handcuffs.

Deputy Darryl Coder had testified in 1983 that the injury to the right wrist looked like injuries he had seen inflicted by the locking mechanisms of handcuffs. Coder added that he could not say whether the injury occurred before or after Fleischli was killed. The jury learned that Thompson had handcuffs in his possession when Mexican authorities arrested him. In 1993, Root specifically disagreed with the conclusion of Deputy Coder that handcuffs caused the injury to the right wrist.

The district court also focused on Richard's statement that finding vaginal bruising or tearing caused by the forceful penetration of an erect penis was "rare as hen's teeth." Brower did not call an expert to rebut that testimony, but he did press Richards strongly on the point during cross-examination.

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4. Because we find no prejudice, we do not reach the State's claims of clear error in the district court's credibility determinations and of abuse of discretion in limiting the State's cross-examination of Root on the issues of his bias and expert credentials. For the purpose of this section, we assume Root's qualifications and lack of bias and we do not rely upon Brower's explanations of his conduct.

Brower's interrogation of Richards on cross-examination resulted in an admission that vaginal bruising or tearing was a common injury to rape victims. Richards also allowed that such injury represented a primary indication of rape as opposed to consensual intercourse. Brower questioned Richards on his insistence that this commonly found injury was only rarely caused by the forceful penetration of an erect penis, asking him if this meant that a large number of rape victims were penetrated by hard objects. While Richards stuck to his original statement, he stated that he always looked for ulceration or bruising as evidence of rape.

The logical conclusion from Brower's cross-examination of Richards was that either Richards thought a large number of rape victims were penetrated by hard objects or he was mistaken regarding the improbability that an erect penis could cause vaginal bruising or tearing. Either way, Brower elicited the basic testimony that vaginal injury is common in rape cases and that Richards did not find it during his autopsy of the victim.

Finally, the district court noted Root's testimony that the lack of semen in Fleischli's jeans and the tightness of the jeans indicated that no rape had occurred. The district attorney impeached the latter theory on cross-examination.

b.

The alleged failure of Thompson's trial counsel to rebut forensic evidence did not prejudice Thompson's defense.

We do not reach the question whether Thompson demonstrated ineffective assistance because we find that he cannot show prejudice. Given Root's 1993 testimony, Brower missed opportunities to rebut only certain aspects of the forensic evidence. In 1993 Root could not exclude the crushing injury to the wrist or the injury to the left hand. His testimony had no

effect on the position in which the body was found, Thompson's admission and the presence of Thompson's semen.

As to the handcuffs, a jury in 1983 would have weighed Root's expertise regarding handcuffs and injuries against Coder's. Coder also qualified his testimony in important regards. Coder admitted that he could not determine whether the injury occurred before or after death, a key question for rape, and Root's testimony regarding that injury would not have fixed it more clearly in time. Coder also admitted that he had only observed such injuries on living persons and that he had no formal training on the subject. The incremental addition of Root's testimony would not have greatly altered the state of the evidence on this issue, which consisted of Coder's opinion as qualified on cross-examination.

Most importantly, the State's own pathologist remarked upon the lack of physical trauma and summarized the evidence by stating that he found no anatomical evidence of rape. Because the defense claimed (1) that Fleischli consented to sex with Thompson and (2) that Leitch, a violent man, inflicted the bruises while killing her, the lack of vaginal bruising stood as the only anatomical evidence crucial to the defense theory. Brower brought out this evidence.

Given the state of the evidence, we find that even if Dr. Root had been called to testify and had testified at the state court trial in the manner in which he did before the district court, there is not a reasonable probability of a different verdict.

We reverse the district court's finding of prejudice relating to the physical evidence of rape.

2.

Second, we examine the district court's determination that Brower rendered ineffective assistance by failing to sufficiently impeach the jailhouse informants, Fink and Del Frate.

a.

Fink testified that while housed in the same module as Thompson, Thompson told him about his crime. According to Fink, Thompson told him he "wanted to screw" Fleischli, but she refused, so he "took it." Fink testified that Thompson admitted to killing her "in a quiet way, like in the jungle," so that she would not turn him in. Fink said that he came forward with the information while talking to investigators regarding another subject. He stated that Thompson's killing of a woman upset him, although he allowed that the killing of a police officer would not have upset him in the same way.

Fink testified that he had asked to spend the remainder of his 29 days in prison in a different facility in return for his testimony. He admitted to four prior felony convictions and to recent heroin use. He added that heroin did not affect his brain. Fink admitted to using several aliases. Finally, Fink conceded that he informed on other inmates and that he stayed in protective custody due to this activity.

The district court listed information that Brower could have obtained about Fink. Fink had informed in several other murder cases, and he had received favors from police and prosecutors which had helped him win release on parole and lower sentences. Officials had also called Fink a liar and a confidence man. The district court found that, because Fink played a crucial role in the State's rape case, Brower's failure to discover and use Fink's history of informing and receiving favors rose to the level of ineffective assistance. Reviewing the damaging evidence used by another defense lawyer against Fink,

the district court made the factual finding that Brower could have obtained the information.

The district court concluded that the jury would have disregarded Fink's testimony if it had learned of the undiscovered information. This conclusion assumes that the jury credited Fink, and the district court based that assumption in part on its finding that other evidence of rape was lacking. As discussed above, however, the State put on a strong rape case even without the informant testimony. The record does not indicate that the jury must have believed Fink in order to convict Thompson of rape.

b.

The alleged shortcomings in state trial counsel's impeachment of Fink did not prejudice Thompson.

Brower discredited Fink by showing that he received the special treatment of protected custody in return for informing, that he was known as a snitch, and that he asked for favors in return for his testimony. This demonstrated a strong motive to lie: Fink's continued survival in prison. Brower mocked Fink's statement that prisoners simply came up to him and told him things that he then told to police. Brower also called Steve Whitton, another prisoner, who testified that Fink obtained his information about Thompson from newspapers. We find no prejudice from Brower's failure to impeach Fink further. Thompson has not demonstrated a reasonable probability of a different outcome had Brower further discredited Fink.

c.

Regarding Del Frate, the district court found that Brower had failed to discover certain impeachment evidence. The court termed most of the evidence cumulative, with the exception of Del Frate's testimony at his 1978 murder trial regarding his long

history as an informant. We note that this history of informing consisted largely of participating in drug buys and not of jailhouse informing. The court found that Brower erred by failing to locate and use this testimony, but determined that it did not independently create sufficient prejudice. The court concluded that it did add to the cumulative prejudice created by Brower's other failures.

d.

No prejudice resulted from Brower's failure to further impeach Del Frate.

Brower could hardly have impeached Del Frate more than he did. Brower brought out the fact that Del Frate did not initially tell investigators that Thompson admitted to forcing himself on Fleischli and stabbing her. Del Frate added these facts later, claiming that the investigators did not originally ask about them. Brower pressed Del Frate to explain inconsistencies in his statement about the stab wounds and the time frame for the rape. The jury was made aware of Del Frate's felony convictions. Brower's representation of Thompson as it concerned Del Frate did not prejudice Thompson.

e.

We conclude that Thompson's trial counsel's allegedly inadequate impeachment of the jailhouse informants did not prejudice Thompson.

Brower impeached both jailhouse informants. Although Thompson argues that the State made much of their testimony during its closing, we do not weigh their importance based upon the attorneys' arguments. The state court trial transcripts disclose that the informants were extensively cross-examined and discredited by Brower. We cannot say that the addition of the

credited evidence, if any, that survived their impeachment formed a crucial part of the case.[5]

Thompson has not shown a reasonable probability of a different verdict were the informants impeached further.

B.

Thompson has not demonstrated errors sufficient to undermine confidence in the verdict. Finding no prejudice from the errors taken separately, we also find no cumulative prejudice. *See Cooper v. Fitzharris*, 586 F.2d 1325, 1333 (9th Cir. 1978) (en banc) ("prejudice may result from the cumulative impact of multiple deficiencies"), *cert. denied*, 440 U.S. 974 (1979).

We reverse the district court's granting in part of the petition on the rape charge.

IV

Thompson appeals the district court's denial of the petition as to the murder conviction. Thompson challenges several of the district court's conclusions.

A.

The district court held that the state trial court's introduction of a hearsay statement by the victim and instructions to the jury regarding that statement did not violate Thompson's rights.

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5. We note again the district court's conclusion that the informants formed a crucial part of the rape case while the same alleged failings in Brower's impeachment of them did not affect the murder case.

On direct examination, Tracy Leitch testified that on the night she died Fleischli had asked "Do you think Tom [Thompson] would kill me?" On cross-examination, Leitch conceded that Fleischli had actually asked "Do you think David [Leitch] would have Tom kill me?"

At the state trial, the judge admitted the statement under California Evidence Code § 1250, as evidence of Fleischli's state of mind indicating a lack of consent to the sexual intercourse with Thompson. The California Supreme Court found the statement properly admitted. *Thompson*, 753 P.2d at 4647. We do not review that particular determination. *Estelle v. McGuire*, 502 U.S. 62, 67 (1991). Rather, we review Thompson's claim that the state trial court's instructions allowed the jury to consider the statement for the purpose of determining guilt of murder and thereby violated his constitutional rights.

The state trial court gave two instructions relating directly to the statement. Before the statement came into evidence, the court gave a limiting instruction to the jury:

> You are not to consider the following testimony as proof of the truth that the murder occurred or that defendant committed such killing. You may consider it only for a determination of the state of mind of the victim, Ginger Fleischli, as it regards a rape and as it may negate a consensual sex act.

After repeating the last sentence for emphasis, the judge added, "That's the only purpose for this, and it's the only use you can put it to in your deliberations."

In giving the final instructions to the jury, however, the court listed the statement as one of numerous factors that the jury could consider in determining guilt or innocence on the murder charge. This instruction directly contradicted the limiting instruction, and it was an error on the part of the trial

court. *Thompson*, 753 P.2d at 48-49. The California Supreme Court and the district court found this error harmless, however, due to the other instructions, the other evidence, and the closing arguments to the jury. *See id.*

Giving an instruction inadequate by direct appeal standards does not necessarily result in habeas relief from a state court conviction. *Duckett v. Godinez*, 67 F.3d 734, 745 (9th Cir. 1995), *cert. denied*, 116 S. Ct. 1549 (1996). The error must rise to a constitutional violation, which depends "upon the evidence in the case and the overall instructions given to the jury." *Id.* (citing *Cupp v. Naughten*, 414 U.S. 141, 146 (1973)).

Taken as a whole, the jury instructions did not highlight the statement as a crucial factor for consideration on the murder charge. In addition to giving the limiting instruction during the testimony, the trial court instructed the jury at the end of the trial that it could also consider the following in determining guilt on the murder charge:

> Seven, that on no occasion prior to the victim's demise had the defendant expressed any animosity, ill will or intent to harm the victim. Eight, that prior to the victim's demise she had expressed a fear of physical harm *from David Leitch*. Nine, that prior to the victim's demise David Leitch had expressed hate and ill will toward the victim and had threatened to have her killed.

(Emphasis added). These factors, by implication, reduced the impact of the erroneous seventh factor given in the other instruction. In addition, the judge reminded the jury of his previous limiting instructions and cautioned the jury not to single out any particular sentence or instruction and ignore all the others. Taking the jury instructions as a whole, it is unlikely that the jurors singled out the erroneous instruction over and above

the limiting instruction, the other factors listed, and the instruction reinforcing the limiting instruction.

The prosecutor's references to the statement in rebuttal argument also weigh in favor of finding harmless error. The prosecutor mentioned the statement three times in rebuttal, but he never singled the statement out as evidence of murder as opposed to evidence of rape.

Finally, the evidence of murder against Thompson was compelling. Listed as it was among other stronger factors weighing in favor of guilt, Fleischli's statement could not have played a critical role in the verdict. If the statement as amended by Tracy Leitch on cross examination indicated anything crucial to murder, it showed a fear of David Leitch. Because the jury instructions as a whole and the evidence do not indicate that the trial became fundamentally unfair due to the erroneous instruction, we affirm the district court on this ground.

B.

The district court rejected Thompson's claim that the State violated his due process rights by pursuing inconsistent theories at his trial and at the trial of David Leitch.

Few courts have addressed this argument, but the principles it invokes are well established. Due process requires a fair trial in a fair tribunal. *Turner v. Louisiana*, 379 U.S. 466 (1965). The prosecutor represents the State, and that representation entails not only attention to the interests of the victim and survivors, but also to society's interest in the fairness of criminal justice administration. *Brady v. Maryland*, 373 U.S. 83, 86 (1963). A prosecutor may not treat a defendant in a manner that undermines society's confidence in the fairness of the process. *Id.* For example, the prosecutor may not obtain a conviction through the use of false evidence. *Mooney v. Holohan*, 294 U.S. 103, 112 (1935); *Napue v. Illinois*, 360 U.S. 264, 269 (1959).

From these principles emerges the requirement that the prosecutor not pursue wholly inconsistent theories of a case at separate trials. *See Haynes v. Cupp*, 827 F.2d 435, 439 (9th Cir. 1987) (variations in state's theories not cause for reversal where theme that each defendant was culpable remained consistent); *Drake v. Francis*, 727 F.2d 990, 994 (11th Cir. 1984), *rev'd in part on other grounds, Drake v. Kemp*, 762 F.2d 1449 (1985) (en banc), *cert. denied*, 478 U.S. 1020 (1986).

Presenting evidence about Fleischli's death, the State emphasized Thompson's involvement at Thompson's trial, and emphasized David Leitch's involvement at Leitch's trial. The approach at Thompson's trial included the prosecutor's unsuccessful objection on relevance grounds to evidence of Leitch's hostility toward Fleischli and argument by the prosecutor that only Thompson was in the apartment with Fleischli when she was killed. In downplaying Leitch's role, the State never argued that the witnesses testifying to Leitch's hostility lacked credibility. This fact deflates Thompson's claim that the State presented factually inconsistent evidence when it called these same witnesses at Leitch's trial. The prosecutor had never indicated that the jury should disbelieve these witnesses; he had simply argued that the evidence in Thompson's trial pointed to Thompson as the killer, notwithstanding Leitch's hostility. We find no prejudice resulting from this theory.

Further, we conclude that if any prejudice had resulted from the differences in emphasis, it would have affected Leitch, not Thompson. *See Drake v. Francis*, 727 F.2d at 994 n.4 (noting that any possible prejudice hurt the defendant not before the court). The trial records in both cases indicate that the State placed Thompson in the apartment at the time of the murder, and the State never argued that Thompson slept through the murder or otherwise failed to participate. Because the prosecution's theory in Leitch's trial did not in any way exonerate Thompson, we affirm the district court's disposition of this issue.

C.

Because trial counsel's alleged ineffective assistance in defending the rape charge did not prejudice the defense of that charge, this alleged ineffective assistance also did not prejudice the defense of the murder charge.

Thompson contends that Brower's alleged failings in defending the rape charge also prejudiced his defense of the murder charge. Thompson argues that the jury, by finding him guilty of rape and murder, accepted the prosecution's felony murder theory, and therefore the ineffective assistance on the rape charge also undermines the murder charge.

We agree that the case presented by the State did not allow for a clear division between evidence of rape and murder. We determine, however, that because Brower's conduct did not prejudice Thompson's defense of the rape charge, it does not undermine confidence in his murder conviction. Because of the strong evidence of rape, we find no "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Clabourne v. Lewis*, 64 F.3d at 1378 (quoting *Strickland*, 466 U.S. at 694).

We affirm the district court's denial in part of the petition on the murder charge.

V

Thompson appeals the district court's denial in part of the petition as to the penalty phase of the state court proceedings.

The facts of the penalty phase are fully set out in *People v. Thompson*, 753 P.2d at 58-59 and in the district court order. The State presented no new evidence. Thompson presented the testimony of family and friends regarding Thompson's childhood and his good qualities. Two psychologists, Dr. Kara Cross and

Dr. Francis Crinella, also testified for Thompson, describing the personality disorders he suffered as the result of a childhood spent living with his strict stepfather. After hearing this evidence and arguments from counsel, the jury returned a death verdict. Thompson raises several challenges to the penalty stage of the proceedings.

A.

Thompson argues that his state trial counsel's ineffective assistance at the guilt phase prejudiced the penalty phase. Thompson has not carried his burden of demonstrating sufficient prejudice at the guilt phase to create a reasonable probability that the jury would have reached a different verdict. Likewise, we determine that Thompson has similarly failed to show that these alleged failings of defense counsel prejudiced the penalty phase.

B.

Thompson challenges the district court's conclusion that the prosecutor's reference in closing argument to an invalid aggravating factor did not prejudice the penalty phase.

At the close of the penalty phase, the prosecutor told the jury:

> The only other evidence that we have presented in the guilt phase about other acts of violence would be the defendant's plan to kill anyone who got in his way or the testimony we've heard from Mr. Del Frate about the defendant's plan to kill the codefendant, Mr. Leitch.

Thompson contends that this argument prejudiced him by adding an aggravating factor of other criminal conduct and negating the mitigating factor of his clean criminal record.

The California Supreme Court found the prosecutor's argument invalid under Cal. Penal Code § 190.3(b), which requires proof beyond a reasonable doubt of conduct constituting commission of an actual crime. *People v. Thompson*, 753 P.2d at 62 (citation omitted). However, both the California Supreme Court and the district court found no prejudice resulting from this argument. *Id.* at 64 (finding it "harmless under any standard . . . ."). We agree.

The arguments of counsel are generally accorded less weight by the jury than the court's instructions. *Boyde v. California*, 494 U.S. 370, 384 (1989). The arguments of counsel must be judged in the context of the entire argument and of the instructions given by the court. *Id.* at 385. The prosecutor mentioned the challenged portion of the argument only once and did not emphasize it. The court instructed the jury that any set of facts considered as an aggravating circumstance must be found by all the jurors to be proven beyond a reasonable doubt. We assume that the jury followed this instruction, and Thompson has shown no reasonable probability that the jury found any other crime proven beyond a reasonable doubt.

Thompson relies on *People v. Lucero*, 750 P.2d 1342, 1349 n.5 (1988), where the prosecutor had argued that the circumstances of the crime charged also qualified as a crime of violence under Cal. Penal Code § 190.3(b) and that the absence of evidence of certain mitigating factors rendered these mitigating factors aggravating. The court noted that the combination of these improper arguments "turned the case upside down," leaving the jury with several aggravating factors and only one mitigating factor: the absence of felony convictions. *Id.* This portion of *Lucero* is dicta; the court stated that it did not base its reversal on the improper arguments and did not assess their prejudicial effect. 750 P.2d at 1357 n. 17. Moreover, *Lucero* involved two problematic arguments, one doubling the aggravating impact of the crime charged and another specifically turning the absence of mitigating factors into

the presence of aggravating ones. The prosecutor's solitary argument here does not present a *Lucero* problem.

The jury could not have concluded that any other crimes were proven beyond a reasonable doubt. Thompson's lack of criminal history and lack of other criminal conduct stood as a mitigating factor. The jury was free under the state trial court's instructions to find that the mitigating circumstances were outweighed by the crimes of which Thompson was convicted.

C.

Thompson challenges several of the state trial court's decisions regarding jury instructions at the penalty phase.

A faulty jury instruction compels the issuance of a writ only where the instruction so infects the entire trial that the resulting conviction violates due process. *Cupp v. Naughten*, 414 U.S. at 147. Where the habeas challenge rests on the failure to give an instruction, the already weighty burden on a petitioner becomes "especially heavy." *Henderson v. Kibbe*, 431 U.S. 145, 155 (1977).

Thompson argues that the penalty instruction misled the jury into believing that it must impose a death penalty if aggravating factors outweighed mitigating factors. The Supreme Court addressed and rejected this argument as applied to the same instruction in *Boyde v. California*, 494 U.S. at 377. We reject it here.

Thompson also contends that the California Supreme Court's decisions finding the instruction invalid result in an unconstitutional differential application of the law in his case. We reject this argument because Thompson failed to raise it before the district court.

Thompson contends that the court erred in declining his jury instruction on potential for rehabilitation and that the

prosecutor improperly argued that he might kill again. Thompson presented no evidence on the specific issue of his potential for rehabilitation.

Moreover, Thompson makes no showing that the jury was precluded from considering his potential for rehabilitation despite the omission of the instruction. While the court rejected Thompson's lengthy proposed instruction that listed rehabilitation as a mitigating factor, the court instructed the jury that: "The mitigating circumstances which I have read for your consideration are given to you merely as examples of some of the factors which you may take into account . . . ." Thompson does not satisfy his heavy burden of showing that the omission of a more specific instruction violated his due process rights.

The prosecutor's single reference to the chance that Thompson might kill again in prison did not prejudice Thompson. This argument stood alone, and the jury was instructed not to speculate or give weight to mere possibilities.

D.

Thompson argues that his state trial counsel rendered ineffective assistance at the penalty phase.

Thompson claims that Brower failed to investigate his background and to interview the psychologists, resulting in the presentation of some damaging testimony. Noting that Thompson did not raise the issue at the evidentiary hearing, the district court found that Brower made an informed tactical decision to put on the psychologists. The court also noted that Dr. Crinella told the defense investigators that his testimony would be damaging. We agree with the district court that Brower's decision to put on the testimony for its helpful aspects deserves deference under *Strickland* as a tactical decision made at the time of the state trial.

Thompson also argues that Brower had no coherent penalty phase strategy, pointing to inconsistencies between Brower's closing argument, where he conceded guilt, and a requested instruction allowing the jury to consider Thompson's lack of intent to kill. We do not find the argument itself to constitute ineffective assistance under the deferential *Strickland* standard. Brower was present at the trial. He saw the evidence and its effect on the jury. At the penalty phase a defense attorney may make the tactical decision to indicate that he identifies with the thought processes of the jurors. We find no possible prejudice from the inconsistency of the argument and the requested jury instruction.

Thompson argues that Brower's failure to request proper instructions on mitigation, the effect of a death verdict and lingering doubts constituted ineffective assistance. Considering the given instructions as a whole, we find that Thompson has not shown that Brower's failure to frame better instructions and the court's failure to give instructions in these areas does not undermine confidence in the outcome.

Having carefully reviewed the record of the penalty phase of the state court trial proceedings, we find no cumulative prejudice sufficient to create a reasonable possibility of a different result.

VI

We conclude that Thompson has not demonstrated prejudice resulting from the alleged ineffective assistance of trial counsel.

Although Thompson raises numerous claims of ineffective assistance at the guilt and penalty phases, he has not shown a reasonable probability that the incremental addition of certain evidence or the incremental reduction in the effect of other evidence would have resulted in a different verdict. The State's

case against Thompson was strong on both the rape and the murder charges. Thompson himself made it much stronger by testifying after counsel advised him not to testify. We are satisfied that the jury would not have reached a different outcome either at the guilt or penalty phase had counsel done all the things that Thompson now claims he should have done. We are confident that the jury reached a just result in a fair proceeding.

We reverse the district court's granting in part of the petition as to the rape conviction. We affirm the district court's denial in part of the petition as to the murder conviction and the death verdict. Because we reverse the district court's granting in part of the petition, the state conviction and sentence will not be disturbed and a writ will not issue.

REVERSED in part and AFFIRMED in part.

ORDER AND AMENDED OPINION
Filed June 19, 1996
Amended March 6, 1997

[Caption Omitted in Printing]

ORDER

The opinion filed June 19, 1996, slip opinion 7189, and appearing at 86 F.3d 1509 (9th Cir. 1996), is amended as follows:

At slip opinion 7207, 1st full ¶:

> Delete "Because the defense claimed (1) that Fleischli consented to sex with Thompson and (2) that Leitch, a violent man, inflicted the bruises while killing her, the lack of vaginal bruising stood as the only anatomical evidence crucial to the defense theory. Brower brought out this evidence."
>
> Move "Most importantly, the State's own pathologist remarked upon the lack of physical trauma and summarized the evidence by stating that he found no anatomical evidence of rape" to the beginning of the next paragraph.

At slip opinion 7210, 2nd full ¶:

> Change "Although Thompson argues that the State made much of their testimony during its closing, we do not weigh their importance based upon the attorneys' arguments. The state court trial transcripts disclose that the informants were extensively cross-examined and discredited by Brower" to read "Thompson argues that the State made much of their testimony during its closing, but the state court trial transcripts disclose that

> the informants were extensively cross-examined and discredited by Brower."

Except for the above amendments, the petition for rehearing is denied. Judges Hall and Leavy vote to reject the suggestion for rehearing en banc and Judge Beezer so recommends.

The full court has been advised of the suggestion for rehearing en banc and no judge in active service has requested a vote to rehear the matter en banc.

Pursuant to Rule 35(b) of the Federal Rules of Appellate Procedure, the petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

OPINION

BEEZER, Circuit Judge:

Arthur Calderon, as warden and on behalf of the State of California, hereinafter the "State," appeals the district court's partial grant of Thomas Martin Thompson's petition for a writ of habeas corpus. The district court's judgment set aside Thompson's 1983 conviction in California state court for the rape of Ginger Fleischli. Thompson appeals the district court's partial denial of the petition challenging his state court conviction for Fleischli's murder and imposition of a sentence of death. The district court had jurisdiction under 28 U.S.C. § 2254. We have jurisdiction pursuant to 28 U.S.C. §§ 1291 and 2253. We reverse the partial grant of Thompson's petition as to the rape charge. We affirm the district court's partial denial of Thompson's petition as to the murder conviction and penalty phase.

I

The evidence, both oral and physical, considered in the state trial court, the decisions made in state appellate proceedings and the matters considered in federal district court are reflected in the record before us.

A.

The state court trial record reveals the evidence presented for and against Thompson.

A California state court jury returned guilty verdicts against Thompson on one count of first-degree murder (Cal. Penal Code §§ 187, 189) and one count of forcible rape (Cal. Penal Code §§ 261(2)) in connection with the death of Ginger Fleischli. The jury also found true the special circumstance of murder during the commission of a rape (Cal. Penal Code § 901-2(a)(17)(iii)).

In a separate proceeding, David Leitch was found guilty of the second degree murder of Fleischli.

During the summer of 1981, Thompson occupied an apartment with David Leitch in Laguna Beach. Not long before, Ginger Fleischli, the 20-year-old victim, had moved out of the same apartment. Fleischli, who had been sexually involved with Leitch, moved in with Leitch's ex-wife, Tracy Leitch.

On September 11, 1981, Fleischli, Tracy Leitch, David Leitch and Thompson met at a pizza parlor on Balboa Island. They removed to the Sandpiper Inn on Pacific Coast Highway in Laguna Beach, where Thompson and Fleischli remained drinking after David and Tracy Leitch departed. Afshin Kashani joined Fleischli and Thompson at about 9:30 p.m. The three drank and danced, both at the Sandpiper and at a nearby bar,

the Boom-Boom Room. Kashani and Thompson also smoked some of Kashani's hashish.

At about 1 a.m., Thompson, Kashani and Fleischli walked back to the apartment occupied by Thompson and Leitch. Kashani and Thompson smoked more hashish. Fleischli departed at about 2 a.m. to purchase some soda at a nearby liquor store. According to Kashani, Thompson indicated to him in Fleischli's absence that he wanted to have sex with Fleischli that night and that Kashani could have her after Thompson left the country.[1]

At trial, Kashani testified that after he departed, he realized that he had forgotten his cigarettes and returned to the apartment. There, a nervous Thompson handed him the cigarettes through the door. Kashani looked for Fleischli at the liquor store; not seeing her, he went home.

Tracy Leitch testified that she went to the apartment the next morning and asked Thompson where Fleischli was. She further testified that he told her that Fleischli had left from the inn with Kashani.

Tracy Leitch again spoke with Thompson that evening about Fleischli's whereabouts. She testified that Thompson answered using the past tense, saying that he had liked Fleischli and that she was a nice girl. The next day, Tracy Leitch filed a missing person's report with the police.

Fleischli's body was found two days later in a grove of trees near an interstate highway. Two sets of footprints appeared near the body. One print matched a wavy soled shoe worn by

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1. Thompson apparently planned to leave the country in order to smuggle Southeast Asian refugees, gold, and possibly cocaine out of Thailand. The State suggested at trial that Fleischli's knowledge of this plan formed part of Thompson's motive for murder.

David Leitch. Investigators could not identify the other footprint, which was smooth.

Fleischli lay buried in dirt, wrapped in an old sleeping bag and a pink blanket that a previous tenant had left in the apartment occupied by Thompson and Leitch. Fibers from the blanket matched fibers found in David Leitch's automobile. A stain on the rope used to tie Fleischli's body matched paint from the trunk of Leitch's vehicle.

Fleischli was stabbed five times in the head near her right ear. A single-edged knife was thrust two and one half inches through Fleischli's ear, penetrated her carotid artery, and caused massive bleeding and ultimately her death. Her head was wrapped with silver duct tape, two towels, a sheet and her jacket. Investigators found her blood in the carpet at the apartment occupied by Leitch and Thompson.

Fleischli's shirt and bra were cut in front and pulled down to her elbows. She wore no shoes, socks or underwear, and her jeans were fully zipped but not buttoned. A vaginal swab revealed semen consistent with Thompson's blood type.

Before Fleischli's body was discovered, Thompson and David Leitch travelled to Mexico together. Leitch returned and was arrested. Mexican authorities located Thompson, who possessed handcuffs at the time of his arrest. Thompson initially claimed that Fleischli had left the apartment with Kashani. Thompson also told police that Fleischli had been stabbed in the head, although the media had not previously reported this information. First denying that he had sexual intercourse with Fleischli, Thompson later asserted that he and Fleischli had consensual intercourse in the apartment.

At the state trial, Dr. Richards, a forensic pathologist, testified that he found no anatomical evidence of rape. The

pathologist expressed the opinion that several bruises on Fleischli's body occurred at or near the time of her death.

A police investigator testified that one of Fleischli's bruises resembled injuries he had seen and known to be caused by handcuffs.

Two jailhouse informants, John Del Frate and Edward Fink, testified that Thompson, while in jail, confessed to committing the rape and murder.

Thompson chose to testify despite his attorney's advice to the contrary. Thompson testified that he had sex with Fleischli and then passed out and slept until the next morning. He said that he heard nothing of the murder in the small apartment. He called witnesses who testified that he was a heavy sleeper, but he himself said that he had been awakened in Mexico by the sound of police cocking the hammers of the revolvers they pointed at his head.

The jury found Thompson guilty of rape and murder.

B.

After Thompson's state appeals failed,[2] Thompson filed a petition for a writ of habeas corpus in federal court.

The district court conducted an evidentiary hearing on Thompson's claim that his attorney, Ronald Brower, provided ineffective assistance of counsel. Thompson called Dr. Irving Root, a forensic pathologist who testified that he could have

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2. The California Supreme Court unanimously affirmed his convictions for rape and murder. *People v. Thompson*, 753 P.2d 37 (Cal. 1988), *cert. denied*, 488 U.S. 960 (1988). State collateral proceedings did not relieve Thompson from the state court judgment and sentence. *People v. Thompson*, No. S008382 (1989); *In re Thompson*, No. S018049 (1991).

given rebuttal evidence in the state trial. A defense investigator contacted Root in 1983, but Brower did not call Root at trial. In 1983, the investigator gave Root sixteen documents, including the autopsy report, and asked for Root's professional opinion about whether rape was likely and what kind of physical trauma is associated with rape. The district court restricted the State's cross-examination of Root concerning his expertise and possible bias.

Brower testified at the evidentiary hearing. He defended his decisions, stating that he did not emphasize the rape charge because he based the defense on Thompson's claim that he did not commit the murder. Brower testified that he had adequately rebutted the forensic evidence and that spending an inordinate amount of time on such evidence would detract from his strategy. Brower also testified that he believed that he conducted sufficient investigation and had adequately impeached the jailhouse informant testimony.

Both sides called attorney expert witnesses to support their arguments regarding ineffective assistance of counsel. One expert, Attorney James Stotler, characterized Brower's representation as high caliber. Attorney Gerald Chaleff, the other expert, termed Brower's representation ineffective and prejudicial to Thompson.

Following post-hearing briefing, the district court granted the petition in part. The court concluded that Brower's failure to impeach Dr. Richards' conclusions and to call a forensic expert, as well as his failure to impeach Fink with testimony concerning numerous prior instances where Fink had informed against others and received favors from law enforcement, rose to the level of ineffective assistance. The district court held that state trial counsel Brower prejudiced Thompson's right to a fair trial on the rape charge. The district court also faulted Brower for failing to further impeach Del Frate. The district court held

that the errors combined to produce prejudice. The State appeals this decision.

The district court rejected all of Thompson's other challenges to the murder conviction and to the death penalty phase of the proceedings. Thompson appeals this decision.

II

We are mindful of the limited role of federal courts in habeas review of state convictions.

"The role of federal habeas proceedings, while important in assuring that constitutional rights are observed, is secondary and limited. Federal courts are not forums in which to relitigate state trials." *Brecht v. Abrahamson*, 507 U.S. 619, 633 (1993) (citation omitted).

We review de novo a district court's order granting or denying a petition for a writ of habeas corpus. *Sanders v. Ratelle*, 21 F.3d 1446, 1451 (9th Cir. 1994). The district court's findings of fact are reviewed for clear error. *Bonin v. Calderon*, 59 F.3d 815, 823 (9th Cir. 1995), *cert. denied*, 116 S. Ct. 718 (1996).

This appeal presents the claimed ineffective assistance of defense counsel as a primary issue. A claim of ineffective assistance of counsel is a mixed question of law and fact which we review de novo. *Harris v. Wood*, 64 F.3d 1432, 1435 (9th Cir. 1995) (citing *Sanders*, 21 F.3d at 1451). Both the performance and prejudice components of the ineffectiveness inquiry present mixed questions which we review de novo. *Strickland v. Washington*, 466 U.S. 668, 698 (1984).

Thompson faces a "strong presumption" that counsel rendered adequate assistance and exercised reasonable professional judgment in making decisions. *Id.* at 690.

Thompson must demonstrate that counsel's performance was "outside the wide range of professionally competent assistance." *Id*. Tactical decisions of trial counsel deserve deference when: (1) counsel in fact bases trial conduct on strategic considerations; (2) counsel makes an informed decision based upon investigation; and (3) the decision appears reasonable under the circumstances. *Sanders v. Ratelle*, 21 F.3d at 1456.

Thompson must do more than show a deficiency of representation; he must also establish prejudice. He must demonstrate a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Clabourne v. Lewis*, 64 F.3d 1373, 1378 (9th Cir. 1995) (quoting *Strickland*, 466 U.S. at 694). "The benchmark for judging any claim of ineffectiveness must be whether counsel' s conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Strickland*, 466 U.S. at 686. Thompson bears the burden of showing that there is a reasonable probability that the jury would not have convicted him had defense counsel not rendered ineffective assistance.

III

The State appeals the district court's partial grant of Thompson's petition.

The district court concluded that Thompson's trial counsel, Ronald Brower, rendered ineffective assistance in defending the rape charge. The court found the ineffective assistance cumulative and prejudicial, resulting from Brower's failure to investigate, his failure to emphasize the lack of physical evidence of rape and his failure to investigate and more thoroughly cross-examine Fink and Del Frate.

A.

In finding prejudice, the district court minimized the evidence of rape and failed to account for the damage done by Thompson's own testimony.

Brower testified in these proceedings that he chose not to emphasize the rape evidence in the state trial because he sought to prove that Thompson did not commit the murder. Thompson's insistence on testifying that he did not rape Fleischli and slept through the murder played a significant part in Brower's decision to adopt this strategy.

Because we disagree with the district court's assessment of the strength of the State's rape case, we confine our review to the prejudice element of the *Strickland* test. *Cf. Williams v. Calderon*, 52 F.3d 1465, 1470 (9th Cir. 1995) (not reaching cause because petitioner had not shown prejudice), *cert. denied*, 116 S. Ct. 937 (1996). The district court inexplicably found the evidence of rape weak but the evidence of murder "overwhelming," even without the testimony of the jailhouse informants who testified to Thompson's confession to both crimes. The State presented strong evidence of rape at the state trial. This evidence overlapped substantially with the evidence of murder. The jury convicted Thompson of both charges. The nature and amount of the evidence compel us to reverse the district court's finding that Thompson had shown Brower's alleged errors to have created a reasonable probability of a different verdict.

The State presented a strong rape case during the state trial. It demonstrated the existence of semen consistent with Thompson's. On the question of consent, the condition of the body provided compelling evidence of rape. Someone had cut Fleischli's shirt and bra up the middle and pulled them down to her elbows, placing her in a position consistent with restraint during a rape. Thompson suggested at trial that someone could

have done this after killing her in order to facilitate moving her body, but the body was otherwise secured by the blanket, tape and ties. No logical inference supported exposing her breasts and restraining her in this fashion merely in order to move her dead body. Fleischli wore no shoes, socks or underwear, and her jeans had been fully zipped but not buttoned. She also suffered a severe crushing injury to her right wrist at or near the time of her death.

Most importantly, Thompson's own testimony did severe damage to his defense.[3] After having lied to police, Thompson admitted having intercourse with Fleischli that night in the apartment, and the jury did not have to believe Thompson's testimony about being sound asleep while Leitch bound, gagged and killed the victim, all a few feet away. After the trial, the state court judge revealed the impact of Thompson's fantastic claims when he took pains to indicate on the record Brower's disagreement with Thompson's decision to testify. The trial judge stated that he wanted to leave "no one believing that defense counsel joined in the *folly* of his client testifying in my observation." (Emphasis added). The district court agreed with this assessment of Thompson 's testimony, stating that it was "devastating to his defense." The district court found it "riddled with inconsistencies and outright falsehoods," and concluded that it "no doubt affected the jury's verdict."

Having reviewed the testimony, we would go further. As in *Williams v. Calderon*, 52 F.2d at 1470, we may here eschew an inquiry into Brower's assistance in favor of a clear determination that Thompson has not shown prejudice, because his own words rank among the most damaging of the testimony presented to the jury. The district court concluded that Brower should have

3. Thompson does not raise on appeal his claim of ineffective assistance based on Brower's alleged failure to adequately prepare him for testifying or dissuade him from testifying. Thompson himself admitted that he ignored Brower's advice.

worked harder to rebut other evidence of rape and the testimony of the informants, but this would not have rebutted the condition and position of the bra and shirt on the body, the presence of some bruising and Thompson's reluctant admission. After reviewing the opportunities that Thompson claims Brower missed, we cannot conclude that they would have made a difference in the verdict.

1.

First, we review the district court's finding of ineffective assistance based upon Brower's failure to rebut forensic evidence of rape.

Brower presented a defense theory in the state trial that Thompson had consensual sex and then Leitch bound, gagged and murdered Fleischli while Thompson slept. Counsel pursued this theory consistent with Thompson's testimony, given against Brower's advice, that he did not commit the murder or rape Fleischli. Brower stated that he did not want to emphasize the possibility of rape by spending an inordinate amount of time on the evidence of bruises. Instead, Brower sought to show that another person, David Leitch, caused the bruises and killed Fleischli while Thompson slept. The district court characterized Brower's general strategy as "flawed," and found his failure to systematically rebut each piece of medical evidence to constitute ineffective assistance of counsel.

a.

We review the areas of forensic evidence that were the focus of the district court's finding.

Prior to trial, Brower interviewed the State's pathologist, Dr. Richards, who told Brower that he had found no "anatomical evidence" of rape. The parties vigorously dispute whether "anatomical evidence" meant vaginal bruising or any

bruising. Brower testified that he asked Richards to clarify "anatomical evidence," and Richards said that he had found no bruising, cuts or discolorations suggesting rape. Brower also testified that he and Richards went over Richards' entire report, including the bruising Richards observed, and that Richards continued to repeat that the findings did not indicate rape. Brower felt that the State could not effectively impeach Richards on these points.

During his state court trial testimony, Richards noted bruises on the victim's arms, wrists, palms and legs. He testified that the photographs of the victim's body showed a "crushing injury with surrounding bruise to the right wrist." A "large recent bruise on the left elbow" also appeared at the autopsy. He characterized a bruise to the right knee as older, but placed all the other bruises at or immediately before the time of death. He ascribed the bruising to "heavy handling," perhaps by hands causing pressure. He expressed the opinion that something heavy caused the crushing injury to the right wrist.

Having discussed the bruises, Richards concluded that there was no anatomical evidence of rape. Thompson vigorously disputes the meaning of the term "anatomical evidence" as used by Richards, arguing that it meant only vaginal bruising or tearing. Richards' testimony supports the inference that by "anatomical evidence," he meant any trauma, not just trauma to the vagina. On the meaning of the bruising, he testified that bruising to parts of the body other than the vagina usually demonstrated lack of consent even more than vaginal bruising. Just after making this statement, Richards admitted on recross that, "[t]here is no anatomical evidence of rape. There is nothing to indicate it whatsoever. I would rely on the semen and sperm analysis." Richards later clarified the term "anatomical evidence" by stating: "Most of the time there is no trauma sufficient to identify at autopsy . . . there need be no evidence of injury at all with rape." He characterized the determination of rape as "a legal matter . . . out of [his] hands."

Richards' 1983 testimony indicates that he found no physical evidence of rape aside from semen.

At the evidentiary hearing in 1993, Root testified that he would have disagreed with several of Richard's conclusions.[4] Root offered the opinion that the bruises on the victim's legs occurred weeks before her death. Root ascribed the marks on the palms to lividity. He allowed that the contusion on the left hand could have occurred at the time of death, but he felt that the injury to the left wrist occurred a minimum of two days before death. He concluded that there was in fact no injury at all to the right elbow. As to the crushing injury to the right wrist, Root could not determine a time frame, but he testified that he saw no injuries consistent with his prior observations of injuries caused by handcuffs.

Deputy Darryl Coder had testified in 1983 that the injury to the right wrist looked like injuries he had seen inflicted by the locking mechanisms of handcuffs. Coder added that he could not say whether the injury occurred before or after Fleischli was killed. The jury learned that Thompson had handcuffs in his possession when Mexican authorities arrested him. In 1993, Root specifically disagreed with the conclusion of Deputy Coder that handcuffs caused the injury to the right wrist.

The district court also focused on Richard's statement that finding vaginal bruising or tearing caused by the forceful penetration of an erect penis was "rare as hen's teeth." Brower did not call an expert to rebut that testimony, but he did press Richards strongly on the point during cross-examination.

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4. Because we find no prejudice, we do not reach the State's claims of clear error in the district court's credibility determinations and of abuse of discretion in limiting the State's cross-examination of Root on the issues of his bias and expert credentials. For the purpose of this section, we assume Root's qualifications and lack of bias and we do not rely upon Brower's explanations of his conduct.

Brower's interrogation of Richards on cross-examination resulted in an admission that vaginal bruising or tearing was a common injury to rape victims. Richards also allowed that such injury represented a primary indication of rape as opposed to consensual intercourse. Brower questioned Richards on his insistence that this commonly found injury was only rarely caused by the forceful penetration of an erect penis, asking him if this meant that a large number of rape victims were penetrated by hard objects. While Richards stuck to his original statement, he stated that he *always* looked for ulceration or bruising as evidence of rape.

The logical conclusion from Brower's cross-examination of Richards was that either Richards thought a large number of rape victims were penetrated by hard objects or he was mistaken regarding the improbability that an erect penis could cause vaginal bruising or tearing. Either way, Brower elicited the basic testimony that vaginal injury is common in rape cases and that Richards did not find it during his autopsy of the victim.

Finally, the district court noted Root's testimony that the lack of semen in Fleischli's jeans and the tightness of the jeans indicated that no rape had occurred. The district attorney impeached the latter theory on cross-examination.

b.

The alleged failure of Thompson's trial counsel to rebut forensic evidence did not prejudice Thompson's defense.

We do not reach the question whether Thompson demonstrated ineffective assistance because we find that he cannot show prejudice. Given Root's 1993 testimony, Brower missed opportunities to rebut only certain aspects of the forensic evidence. In 1993 Root could not exclude the crushing injury to the wrist or the injury to the left hand. His testimony had no

effect on the position in which the body was found, Thompson's admission and the presence of Thompson's semen.

As to the handcuffs, a jury in 1983 would have weighed Root's expertise regarding handcuffs and injuries against Coder's. Coder also qualified his testimony in important regards. Coder admitted that he could not determine whether the injury occurred before or after death, a key question for rape, and Root's testimony regarding that injury would not have fixed it more clearly in time. Coder also admitted that he had only observed such injuries on living persons and that he had no formal training on the subject. The incremental addition of Root's testimony would not have greatly altered the state of the evidence on this issue, which consisted of Coder's opinion as qualified on cross-examination.

Most importantly, the State's own pathologist remarked upon the lack of physical trauma and summarized the evidence by stating that he found no anatomical evidence of rape. Given the state of the evidence, we find that even if Dr. Root had been called to testify and had testified at the state court trial in the manner in which he did before the district court, there is not a reasonable probability of a different verdict.

We reverse the district court's finding of prejudice relating to the physical evidence of rape.

2.

Second, we examine the district court's determination that Brower rendered ineffective assistance by failing to sufficiently impeach the jailhouse informants, Fink and Del Frate.

a.

Fink testified that while housed in the same module as Thompson, Thompson told him about his crime. According to

Fink, Thompson told him he "wanted to screw" Fleischli, but she refused, so he "took it." Fink testified that Thompson admitted to killing her "in a quiet way, like in the jungle," so that she would not turn him in. Fink said that he came forward with the information while talking to investigators regarding another subject. He stated that Thompson's killing of a woman upset him, although he allowed that the killing of a police officer would not have upset him in the same way.

Fink testified that he had asked to spend the remainder of his 29 days in prison in a different facility in return for his testimony. He admitted to four prior felony convictions and to recent heroin use. He added that heroin did not affect his brain. Fink admitted to using several aliases. Finally, Fink conceded that he informed on other inmates and that he stayed in protective custody due to this activity.

The district court listed information that Brower could have obtained about Fink. Fink had informed in several other murder cases, and he had received favors from police and prosecutors which had helped him win release on parole and lower sentences. Officials had also called Fink a liar and a confidence man. The district court found that, because Fink played a crucial role in the State's rape case, Brower's failure to discover and use Fink's history of informing and receiving favors rose to the level of ineffective assistance. Reviewing the damaging evidence used by another defense lawyer against Fink, the district court made the factual finding that Brower could have obtained the information.

The district court concluded that the jury would have disregarded Fink's testimony if it had learned of the undiscovered information. This conclusion assumes that the jury credited Fink, and the district court based that assumption in part on its finding that other evidence of rape was lacking. As discussed above, however, the State put on a strong rape case even without the informant testimony. The record does not

indicate that the jury must have believed Fink in order to convict Thompson of rape.

b.

The alleged shortcomings in state trial counsel's impeachment of Fink did not prejudice Thompson.

Brower discredited Fink by showing that he received the special treatment of protected custody in return for informing, that he was known as a snitch, and that he asked for favors in return for his testimony. This demonstrated a strong motive to lie: Fink's continued survival in prison. Brower mocked Fink's statement that prisoners simply came up to him and told him things that he then told to police. Brower also called Steve Whitton, another prisoner, who testified that Fink obtained his information about Thompson from newspapers. We find no prejudice from Brower's failure to impeach Fink further. Thompson has not demonstrated a reasonable probability of a different outcome had Brower further discredited Fink.

c.

Regarding Del Frate, the district court found that Brower had failed to discover certain impeachment evidence. The court termed most of the evidence cumulative, with the exception of Del Frate's testimony at his 1978 murder trial regarding his long history as an informant. We note that this history of informing consisted largely of participating in drug buys and not of jailhouse informing. The court found that Brower erred by failing to locate and use this testimony, but determined that it did not independently create sufficient prejudice. The court concluded that it did add to the cumulative prejudice created by Brower's other failures.

d.

No prejudice resulted from Brower's failure to further impeach Del Frate.

Brower could hardly have impeached Del Frate more than he did. Brower brought out the fact that Del Frate did not initially tell investigators that Thompson admitted to forcing himself on Fleischli and stabbing her. Del Frate added these facts later, claiming that the investigators did not originally ask about them. Brower pressed Del Frate to explain inconsistencies in his statement about the stab wounds and the time frame for the rape. The jury was made aware of Del Frate's felony convictions. Brower's representation of Thompson as it concerned Del Frate did not prejudice Thompson.

e.

We conclude that Thompson's trial counsel's allegedly inadequate impeachment of the jailhouse informants did not prejudice Thompson.

Brower impeached both jailhouse informants. Thompson argues that the State made much of their testimony during its closing, but the state court trial transcripts disclose that the informants were extensively cross-examined and discredited by Brower. We cannot say that the addition of the credited evidence, if any, that survived their impeachment formed a crucial part of the case.[5]

Thompson has not shown a reasonable probability of a different verdict were the informants impeached further.

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5. We note again the district court's conclusion that the informants formed a crucial part of the rape case while the same alleged failings in Brower's impeachment of them did not affect the murder case.

Thompson has not demonstrated errors sufficient to undermine confidence in the verdict. Finding no prejudice from the errors taken separately, we also find no cumulative prejudice. *See Cooper v. Fitzharris*, 586 F.2d 1325, 1333 (9th Cir. 1978) (en banc) ("prejudice may result from the cumulative impact of multiple deficiencies"), *cert. denied*, 440 U.S. 974 (1979).

We reverse the district court's granting in part of the petition on the rape charge.

IV

Thompson appeals the district court's denial of the petition as to the murder conviction. Thompson challenges several of the district court's conclusions.

A.

The district court held that the state trial court's introduction of a hearsay statement by the victim and instructions to the jury regarding that statement did not violate Thompson's rights.

On direct examination, Tracy Leitch testified that on the night she died Fleischli had asked "Do you think Tom [Thompson] would kill me?" On cross-examination, Leitch conceded that Fleischli had actually asked "Do you think David [Leitch] would have Tom kill me?"

At the state trial, the judge admitted the statement under California Evidence Code § 1250, as evidence of Fleischli's state of mind indicating a lack of consent to the sexual intercourse with Thompson. The California Supreme Court found the statement properly admitted. *Thompson*, 753 P.2d at 4647. We do not review that particular determination. *Estelle v. McGuire*, 502 U.S. 62, 67 (1991). Rather, we review Thompson's claim

that the state trial court's instructions allowed the jury to consider the statement for the purpose of determining guilt of murder and thereby violated his constitutional rights.

The state trial court gave two instructions relating directly to the statement. Before the statement came into evidence, the court gave a limiting instruction to the jury:

> You are not to consider the following testimony as proof of the truth that the murder occurred or that defendant committed such killing. You may consider it only for a determination of the state of mind of the victim, Ginger Fleischli, as it regards a rape and as it may negate a consensual sex act.

After repeating the last sentence for emphasis, the judge added, "That's the only purpose for this, and it's the only use you can put it to in your deliberations."

In giving the final instructions to the jury, however, the court listed the statement as one of numerous factors that the jury could consider in determining guilt or innocence on the murder charge. This instruction directly contradicted the limiting instruction, and it was an error on the part of the trial court. *Thompson*, 753 P.2d at 48-49. The California Supreme Court and the district court found this error harmless, however, due to the other instructions, the other evidence, and the closing arguments to the jury. *See id.*

Giving an instruction inadequate by direct appeal standards does not necessarily result in habeas relief from a state court conviction. *Duckett v. Godinez*, 67 F.3d 734, 745 (9th Cir. 1995), *cert. denied*, 116 S. Ct. 1549 (1996). The error must rise to a constitutional violation, which depends "upon the evidence in the case and the overall instructions given to the jury." *Id.* (citing *Cupp v. Naughten*, 414 U.S. 141, 146 (1973)).

Taken as a whole, the jury instructions did not highlight the statement as a crucial factor for consideration on the murder charge. In addition to giving the limiting instruction during the testimony, the trial court instructed the jury at the end of the trial that it could also consider the following in determining guilt on the murder charge:

> Seven, that on no occasion prior to the victim's demise had the defendant expressed any animosity, ill will or intent to harm the victim. Eight, that prior to the victim's demise she had expressed a fear of physical harm *from David Leitch*. Nine, that prior to the victim's demise David Leitch had expressed hate and ill will toward the victim and had threatened to have her killed.

(Emphasis added). These factors, by implication, reduced the impact of the erroneous seventh factor given in the other instruction. In addition, the judge reminded the jury of his previous limiting instructions and cautioned the jury not to single out any particular sentence or instruction and ignore all the others. Taking the jury instructions as a whole, it is unlikely that the jurors singled out the erroneous instruction over and above the limiting instruction, the other factors listed, and the instruction reinforcing the limiting instruction.

The prosecutor's references to the statement in rebuttal argument also weigh in favor of finding harmless error. The prosecutor mentioned the statement three times in rebuttal, but he never singled the statement out as evidence of murder as opposed to evidence of rape.

Finally, the evidence of murder against Thompson was compelling. Listed as it was among other stronger factors weighing in favor of guilt, Fleischli's statement could not have played a critical role in the verdict. If the statement as amended by Tracy Leitch on cross examination indicated

anything crucial to murder, it showed a fear of David Leitch. Because the jury instructions as a whole and the evidence do not indicate that the trial became fundamentally unfair due to the erroneous instruction, we affirm the district court on this ground.

B.

The district court rejected Thompson's claim that the State violated his due process rights by pursuing inconsistent theories at his trial and at the trial of David Leitch.

Few courts have addressed this argument, but the principles it invokes are well established. Due process requires a fair trial in a fair tribunal. *Turner v. Louisiana*, 379 U.S. 466 (1965). The prosecutor represents the State, and that representation entails not only attention to the interests of the victim and survivors, but also to society's interest in the fairness of criminal justice administration. *Brady v. Maryland*, 373 U.S. 83, 86 (1963). A prosecutor may not treat a defendant in a manner that undermines society's confidence in the fairness of the process. *Id.* For example, the prosecutor may not obtain a conviction through the use of false evidence. *Mooney v. Holohan*, 294 U.S. 103, 112 (1935); *Napue v. Illinois*, 360 U.S. 264, 269 (1959). From these principles emerges the requirement that the prosecutor not pursue wholly inconsistent theories of a case at separate trials. *See Haynes v. Cupp*, 827 F.2d 435, 439 (9th Cir. 1987) (variations in state's theories not cause for reversal where theme that each defendant was culpable remained consistent); *Drake v. Francis*, 727 F.2d 990, 994 (11th Cir. 1984), *rev'd in part on other grounds*, *Drake v. Kemp*, 762 F.2d 1449 (1985) (en banc), *cert. denied*, 478 U.S. 1020 (1986).

Presenting evidence about Fleischli's death, the State emphasized Thompson's involvement at Thompson's trial, and emphasized David Leitch's involvement at Leitch's trial. The approach at Thompson's trial included the prosecutor's unsuccessful objection on relevance grounds to evidence of

Leitch's hostility toward Fleischli and argument by the prosecutor that only Thompson was in the apartment with Fleischli when she was killed. In downplaying Leitch's role, the State never argued that the witnesses testifying to Leitch's hostility lacked credibility. This fact deflates Thompson's claim that the State presented factually inconsistent evidence when it called these same witnesses at Leitch's trial. The prosecutor had never indicated that the jury should disbelieve these witnesses; he had simply argued that the evidence in Thompson's trial pointed to Thompson as the killer, notwithstanding Leitch's hostility. We find no prejudice resulting from this theory.

Further, we conclude that if any prejudice had resulted from the differences in emphasis, it would have affected Leitch, not Thompson. *See Drake v. Francis*, 727 F.2d at 994 n.4 (noting that any possible prejudice hurt the defendant not before the court). The trial records in both cases indicate that the State placed Thompson in the apartment at the time of the murder, and the State never argued that Thompson slept through the murder or otherwise failed to participate. Because the prosecution's theory in Leitch's trial did not in any way exonerate Thompson, we affirm the district court's disposition of this issue.

C.

Because trial counsel's alleged ineffective assistance in defending the rape charge did not prejudice the defense of that charge, this alleged ineffective assistance also did not prejudice the defense of the murder charge.

Thompson contends that Brower's alleged failings in defending the rape charge also prejudiced his defense of the murder charge. Thompson argues that the jury, by finding him guilty of rape and murder, accepted the prosecution's felony murder theory, and therefore the ineffective assistance on the rape charge also undermines the murder charge.

We agree that the case presented by the State did not allow for a clear division between evidence of rape and murder. We determine, however, that because Brower's conduct did not prejudice Thompson's defense of the rape charge, it does not undermine confidence in his murder conviction. Because of the strong evidence of rape, we find no "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Clabourne v. Lewis*, 64 F.3d at 1378 (quoting *Strickland*, 466 U.S. at 694).

We affirm the district court's denial in part of the petition on the murder charge.

V

Thompson appeals the district court's denial in part of the petition as to the penalty phase of the state court proceedings.

The facts of the penalty phase are fully set out in *People v. Thompson*, 753 P.2d at 58-59 and in the district court order. The State presented no new evidence. Thompson presented the testimony of family and friends regarding Thompson's childhood and his good qualities. Two psychologists, Dr. Kara Cross and Dr. Francis Crinella, also testified for Thompson, describing the personality disorders he suffered as the result of a childhood spent living with his strict stepfather. After hearing this evidence and arguments from counsel, the jury returned a death verdict. Thompson raises several challenges to the penalty stage of the proceedings.

A.

Thompson argues that his state trial counsel's ineffective assistance at the guilt phase prejudiced the penalty phase. Thompson has not carried his burden of demonstrating sufficient prejudice at the guilt phase to cream a reasonable probability that the jury would have reached a different verdict. Likewise,

we determine that Thompson has similarly failed to show that these alleged failings of defense counsel prejudiced the penalty phase.

B.

Thompson challenges the district court's conclusion that the prosecutor's reference in closing argument to an invalid aggravating factor did not prejudice the penalty phase.

At the close of the penalty phase, the prosecutor told the jury:

> The only other evidence that we have presented in the guilt phase about other acts of violence would be the defendant's plan to kill anyone who got in his way or the testimony we've heard from Mr. Del Frate about the defendant's plan to kill the codefendant, Mr. Leitch.

Thompson contends that this argument prejudiced him by adding an aggravating factor of other criminal conduct and negating the mitigating factor of his clean criminal record.

The California Supreme Court found the prosecutor's argument invalid under Cal. Penal Code § 190.3(b), which requires proof beyond a reasonable doubt of conduct constituting commission of an actual crime. *People v. Thompson*, 753 P.2d at 62 (citation omitted). However, both the California Supreme Court and the district court found no prejudice resulting from this argument. *Id.* at 64 (finding it "harmless under any standard . . . ."). We agree.

The arguments of counsel are generally accorded less weight by the jury than the court's instructions. *Boyde v. California*, 494 U.S. 370, 384 (1989). The arguments of counsel must be judged in the context of the entire argument and of the

instructions given by the court. *Id*. at 385. The prosecutor mentioned the challenged portion of the argument only once and did not emphasize it. The court instructed the jury that any set of facts considered as an aggravating circumstance must be found by all the jurors to be proven beyond a reasonable doubt. We assume that the jury followed this instruction, and Thompson has shown no reasonable probability that the jury found any other crime proven beyond a reasonable doubt.

Thompson relies on *People v. Lucero*, 750 P.2d 1342, 1349 n.5 (1988), where the prosecutor had argued that the circumstances of the crime charged also qualified as a crime of violence under Cal. Penal Code § 190.3(b) and that the absence of evidence of certain mitigating factors rendered these mitigating factors aggravating. The court noted that the combination of these improper arguments "turned the case upside down," leaving the jury with several aggravating factors and only one mitigating factor: the absence of felony convictions. *Id*. This portion of *Lucero* is dicta; the court stated that it did not base its reversal on the improper arguments and did not assess their prejudicial effect. 750 P.2d at 1357 n. 17. Moreover, *Lucero* involved two problematic arguments, one doubling the aggravating impact of the crime charged and another specifically turning the absence of mitigating factors into the presence of aggravating ones. The prosecutor's solitary argument here does not present a *Lucero* problem.

The jury could not have concluded that any other crimes were proven beyond a reasonable doubt. Thompson's lack of criminal history and lack of other criminal conduct stood as a mitigating factor. The jury was free under the state trial court's instructions to find that the mitigating circumstances were outweighed by the crimes of which Thompson was convicted.

C.

Thompson challenges several of the state trial court's decisions regarding jury instructions at the penalty phase.

A faulty jury instruction compels the issuance of a writ only where the instruction so infects the entire trial that the resulting conviction violates due process. *Cupp v. Naughten*, 414 U.S. at 147. Where the habeas challenge rests on the failure to give an instruction, the already weighty burden on a petitioner becomes "especially heavy." *Henderson v. Kibbe*, 431 U.S. 145, 155 (1977).

Thompson argues that the penalty instruction misled the jury into believing that it must impose a death penalty if aggravating factors outweighed mitigating factors. The Supreme Court addressed and rejected this argument as applied to the same instruction in *Boyde v. California*, 494 U.S. at 377. We reject it here.

Thompson also contends that the California Supreme Court's decisions finding the instruction invalid result in an unconstitutional differential application of the law in his case. We reject this argument because Thompson failed to raise it before the district court.

Thompson contends that the court erred in declining his jury instruction on potential for rehabilitation and that the prosecutor improperly argued that he might kill again. Thompson presented no evidence on the specific issue of his potential for rehabilitation.

Moreover, Thompson makes no showing that the jury was precluded from considering his potential for rehabilitation despite the omission of the instruction. While the court rejected Thompson's lengthy proposed instruction that listed rehabilitation as a mitigating factor, the court instructed the jury that: "The mitigating circumstances which I have read for your

consideration are given to you merely as examples of some of the factors which you may take into account . . . ." Thompson does not satisfy his heavy burden of showing that the omission of a more specific instruction violated his due process rights.

The prosecutor's single reference to the chance that Thompson might kill again in prison did not prejudice Thompson. This argument stood alone, and the jury was instructed not to speculate or give weight to mere possibilities.

D.

Thompson argues that his state trial counsel rendered ineffective assistance at the penalty phase.

Thompson claims that Brower failed to investigate his background and to interview the psychologists, resulting in the presentation of some damaging testimony. Noting that Thompson did not raise the issue at the evidentiary hearing, the district court found that Brower made an informed tactical decision to put on the psychologists. The court also noted that Dr. Crinella told the defense investigators that his testimony would be damaging. We agree with the district court that Brower's decision to put on the testimony for its helpful aspects deserves deference under *Strickland* as a tactical decision made at the time of the state trial.

Thompson also argues that Brower had no coherent penalty phase strategy, pointing to inconsistencies between Brower's closing argument, where he conceded guilt, and a requested instruction allowing the jury to consider Thompson's lack of intent to kill. We do not find the argument itself to constitute ineffective assistance under the deferential *Strickland* standard. Brower was present at the trial. He saw the evidence and its effect on the jury. At the penalty phase a defense attorney may make the tactical decision to indicate that he identifies with the thought processes of the jurors. We find no possible prejudice

from the inconsistency of the argument and the requested jury instruction.

Thompson argues that Brower's failure to request proper instructions on mitigation, the effect of a death verdict and lingering doubts constituted ineffective assistance. Considering the given instructions as a whole, we find that Thompson has not shown that Brower's failure to frame better instructions and the court's failure to give instructions in these areas does not undermine confidence in the outcome.

Having carefully reviewed the record of the penalty phase of the state court trial proceedings, we find no cumulative prejudice sufficient to create a reasonable possibility of a different result.

VI

We conclude that Thompson has not demonstrated prejudice resulting from the alleged ineffective assistance of trial counsel.

Although Thompson raises numerous claims of ineffective assistance at the guilt and penalty phases, he has not shown a reasonable probability that the incremental addition of certain evidence or the incremental reduction in the effect of other evidence would have resulted in a different verdict. The State's case against Thompson was strong on both the rape and the murder charges. Thompson himself made it much stronger by testifying after counsel advised him not to testify. We are satisfied that the jury would not have reached a different outcome either at the guilt or penalty phase had counsel done all the things that Thompson now claims he should have done. We are confident that the jury reached a just result in a fair proceeding.

We reverse the district court's granting in part of the petition as to the rape conviction. We affirm the district court's denial in part of the petition as to the murder conviction and the death verdict. Because we reverse the district court's granting in part of the petition, the state conviction and sentence will not be disturbed and a writ will not issue.

REVERSED in part and AFFIRMED in part.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE CENTRAL DISTRICT OF CALIFORNIA

THOMAS M. THOMPSON,
Petitioner

v.

ARTHUR CALDERON, Warden
of the California State Prison at San Quentin,
Respondent

ORDER RE PETITIONER'S MOTION FOR RELIEF FROM JUDGMENT PURSUANT TO FRCP 60(b)
Filed July 25, 1997

Background

1. Factual Summary

During the summer of 1981, Thompson occupied a studio apartment with David Leitch in Laguna Beach. Ginger Fleischli had previously lived in the apartment with Leitch and had been sexually involved with him. On September 11, 1981, Thompson, Leitch, and Fleischli spent an evening drinking and dancing in Laguna Beach. Eventually, Thompson and Fleischli ended up at the apartment together. Two days later, Fleischli's body was discovered near a highway. She had been stabbed to death. Various items of physical evidence linked her body to the apartment shared by Thompson and Leitch, and to Leitch's car.

In 1983, Thompson was tried before a jury for the rape and murder of Ginger Fleischli. Thompson testified that he had consensual sex with Fleischli, then passed out and slept until the

next morning. Two jailhouse informants testified that Thompson had confessed to them in jail that he had raped and killed Fleischli. Although there was no anatomical evidence of rape, evidence was introduced that bruises on Fleischli's body had occurred at or near the time of her death, and there was additional circumstantial physical evidence of rape.

The jury found Thompson guilty of the rape and murder of Ginger Fleischli. It also found true the special circumstance allegations of murder during the commission of a rape, and sentenced Thompson to death. In a separate proceeding, Leitch was found guilty of the second degree murder of Fleischli.

2. Procedural Background

Petitioner's conviction and sentence were affirmed on direct appeal. People v. Thompson, 45 Cal. 3d 86, 246 Cal. Rptr. 245, cert. denied, 488 U.S. 960 (1988). On December 22, 1988, Thompson filed a petition for writ of habeas corpus in the California Supreme Court, which was denied on March 23, 1989.

On January 16, 1990, Thompson filed his first federal habeas petition. The federal petition was found to contain unexhausted claims, and petitioner was sent back to state court to exhaust state remedies on his federal constitutional claims. After the California Supreme Court's denial of the state habeas petition, petitioner filed an amended federal habeas petition. In November 1993, the Court held an evidentiary hearing. On March 29, 1995, the Court entered an order denying Thompson's petition as to his conviction for first degree murder, and granting the petition as to the rape conviction and special circumstance finding, thereby vacating the sentence of death.

On appeal, the Ninth Circuit affirmed in part and reversed in part the district court's judgment. Thompson v. Calderon, 109 F.3d 1358 (9th Cir. 1997) The court of appeals affirmed the district court's denial of relief as to the first degree murder

conviction, and reversed the judgment on the rape charge and the death sentence. The United States Supreme Court denied petitioner's petition for writ of certiorari on June 2, 1997, Thompson v. Calderon, No. 96-8707, 1997 WL 221425 (U.S., June 2, 1997), and the Ninth Circuit issued the mandate to this court on June 11, 1997. Petitioner is scheduled to be executed on August 5, 1997.

On July 23, 1997, petitioner filed the instant Motion for Relief from Judgment Pursuant to FRCP 60(b). Respondent filed an opposition to the motion on July 23, 1997, addressing the procedural aspects of petitioner's motion, and on the same day filed a supplemental opposition addressing the merits of petitioner's motion. Petitioner filed a reply on July 24, 1997.

Having reviewed petitioner's papers in support of the motion, including petitioner's proposed amended petition, respondent's papers submitted in opposition to the motion, petitioner's reply, and listened to the arguments of counsel for both petitioner and respondent made in open court, the Court now issues its ruling on petitioner's motion.

Discussion

1. Standard Governing Petitioner's Motion

A. Petitioner's Rule 60(b) Motion Must be Treated as the Functional Equivalent of a Second Petition.

Although the Ninth Circuit has recognized the availability of a Rule 60(b) motion after final judgment in a habeas corpus proceeding, the circuit has also made it clear that such a motion must be treated as the functional equivalent of a second petition. Clark v. Lewis, 1 F.3d 814, 825 (9th Cir. 1993) ("[W]here a habeas petitioner tries to raise new facts or new claims not included in prior proceedings in a Rule 60(b) motion,

such motion should be treated as the equivalent of a second petition for writ of habeas corpus.") (emphasis added). The circuit has explained that "because a Rule 60(b) motion following the entry of final judgment in a habeas case raises policy concerns similar to those implicated by a second petition," it is subject to the same standard that governs whether a petitioner should be permitted to file a second petition. Bonin v. Vasquez, 999 F.2d 425, 428 (9th Cir. 1993).

Petitioner must not be permitted to utilize a Rule 60(b) motion to make an end-run around the requirements of 28 U.S.C. § 2244(b). "The Federal Rules of Civil Procedure apply in the context of habeas suits to the extent that they are not inconsistent with the Habeas Corpus Rules." McFarland v. Scott, 512 U.S. 849, 866 (1994). Federal Rule of Civil Procedure 81(a)(2) explicitly states that the Federal Rules of Civil Procedure are applicable to habeas corpus actions only "to the extent that the practice in such proceedings is not set forth in statutes of the United States . . . ." Petitioner cannot invoke Rule 60(b) in an attempt to "alter the statutory command" of 28 U.S.C. § 2254. Pitchess v. Davis, 421 U.S. 482, 489 (1975).

Therefore, petitioner's Rule 60(b) motion must be treated as the functional equivalent of a second petition for writ of habeas corpus.

B. Under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") Petitioner Must First Obtain an Order Authorizing this Court to Consider the Second Petition.

On April 24, 1996, the AEDPA was signed into law. The AEDPA placed new limitations on claims that could be raised in a second or successive petition. Under the AEDPA "[b]efore a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to

consider the application." 28 U.S.C. § 2244(b)(3)(A) (emphasis added).

Pursuant to the AEDPA, the court of appeals, and not the district court, has the responsibility for determining whether a second petition violates the abuse of the writ doctrine. When examining 28 U.S.C. § 2244(b)(3), the Supreme Court explained that:

> this requirement simply transfers from the district court to the court of appeals *a screening function which would previously have been performed by the district court* as required by 28 U.S.C. § 2254 Rule 9(b). The Act also codifies some of the pre-existing limits on successive petitions, and further restricts the availability of relief to habeas petitioners.

Felker v. Turpin, 116 S. Ct. 2333, 2340 (1996) (emphasis added).

The new scheme under 28 U.S.C. § 2244(b) has been referred to by the Supreme Court as the "'gatekeeping system for second petitions," which "applies to applications 'filed in the district court.'" Felker, 116 S. Ct. at 2339.

The Court is not persuaded by petitioner's argument that, to the extent his motion is deemed to be a second petition, the abuse of the writ standard of McCleskey v. Zant, 499 U.S. 467 (1991) should be applied, and not the more stringent standards of the AEDPA. Petitioner contends that his case was "pending" when AEDPA was enacted. This overlooks the fact that judgment on petitioner's first federal habeas proceeding in this Court was final when the case was returned to this court and the mandate was spread. See Calderon v. United States District Court (Beeler), 112 F.3d 386, 389 n.2 (9th Cir. 1997) (dicta) (citing 16A Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice and Procedure § 3987, at 687 n.2 (2d ed. 1996)). At the time petitioner filed his Rule 60(b) motion,

petitioner did not have any case pending in this Court, and the AEDPA had already been passed into law. While petitioner attempts to present the instant motion in a manner so as to re-open the original habeas proceedings in this Court, by requesting the Court to grant his motion for relief from the judgment and grant petitioner leave to amend his petition, the continued availability of a Rule 60(b) motion after final judgment does not establish that his federal habeas proceedings were pending in this Court after the filing and spreading of the mandate. By filing a Rule 60(b) motion with this Court on July 23, 1997 -- the functional equivalent of a second petition -- petitioner is attempting to use Rule 60(b) to circumvent the requirements set forth in the newly enacted 28 U.S.C. § 2244(b). As previously discussed, petitioner may not utilize the Federal Rules of Civil Procedure to achieve results inconsistent with the statutory command of 28 U.S.C. § 2254. Pitchess, 421 U.S. at 489.

The Court finds that petitioner's Rule 60(b) motion is the functional equivalent of a second petition, and that there was no case pending in this Court prior to the filing of the Rule 60(b) motion. Accordingly, the AEDPA governs the question of whether petitioner should be permitted to bring this motion. Under the AEDPA, petitioner's motion cannot properly be filed in this Court unless the court of appeals first authorizes its filing, as set forth in 28 U.S.C. § 2244(b)(3)(A). Thus, petitioner's motion is DENIED on the ground that this Court lacks jurisdiction to consider it absent prior authorization from the Ninth Circuit.

2. Assuming Arguendo That The AEDPA Does Not Apply to Petitioner's Rule 60(b) Motion, Petitioner Cannot Meet the Cause and Prejudice Standard.

The cause and prejudice standard is a means of enforcing Habeas Corpus Rule 9(b)'s directive that a second petition alleging new grounds for relief may be dismissed if "the failure

of the petitioner to assert those grounds in a prior petition constituted an abuse of the writ." See Harris v. Vasquez, 949 F.2d 1497, 1511 (9th Cir. 1990) (citing 28 U.S.C. § 2254 foll. Rule 9(b) (1988)). A petitioner may obtain federal review of the merits of a new claim presented in a second federal habeas petition only if he can demonstrate cause for failing to raise the claim earlier and prejudice therefrom, or if he can show that a fundamental miscarriage of justice would occur if the Court failed to review the merits of his claim. McCleskey v. Zant, 499 U.S. 467, 494-95 (1991).

Petitioner contends that his new claims for federal habeas relief are based on newly discovered evidence of his actual innocence of capital murder, and that this material evidence was suppressed by the State. This evidence consists of statements by petitioner's codefendant David Leitch to the effect that on the night of the murder, Leitch entered the apartment around 3:00 a.m, saw petitioner and Fleischli engaged in what appeared to him to be consensual intercourse on the floor of the apartment, and then turned around and left the apartment to wait outside on the beach for the two to finish having sex. Leitch allegedly made these statements to sheriff's investigators prior to petitioner's trial, again to his own lawyer prior to his separate trial for the Fleischli murder two years later, and again in 1995 at a parole board hearing conducted at the California State Prison. Based on this newly discovered evidence, petitioner seeks to litigate the following two claims for federal habeas relief:

(1) The State's execution of petitioner would violate petitioner's federal constitutional rights because petitioner has made a "truly persuasive demonstration of actual innocence . . . ." See Herrera v. Collins, 506 U.S. 390, 417 (1993). Proposed Amended Petition, ¶¶ 1-57.

(2) Petitioner's conviction and sentence of death were obtained in violation of petitioner's federal constitutional right to a trial at which the State has previously disclosed to the defense all evidence that is both favorable to the accused and "material either to guilt or to punishment." See Brady v. Maryland, 373 U.S. 83, 87 (1963). Proposed Amended Petition, ¶¶ 58-74.

Petitioner asserts that he should be permitted to litigate these new claims because he has satisfied both the "cause and prejudice" prong and the "fundamental miscarriage of justice" prong of McCleskey. But in fact petitioner has failed even to make a colorable showing of the existence of the evidence on which his Brady claim is based. Even if petitioner could overcome this obstacle, he has failed to establish the presence of cause and prejudice sufficient to justify allowing him to litigate his new claims in a second petition. And petitioner certainly has not made the persuasive demonstration of actual innocence that is required to establish that a fundamental miscarriage of justice will result if the State of California is permitted to execute him.

Petitioner's claims for relief are primarily based on two alleged statements made at different times by David Leitch, the first prior to petitioner's trial, and the other at a January 4, 1995 Parole Board hearing.

A. Leitch's Alleged Statement To Law Enforcement Officials Prior To Petitioner's Trial

1. The Evidence Of Leitch's Alleged Statement Is Extremely Weak.

The foundation upon which petitioner's new claim that the State illegally suppressed material exculpatory evidence during

petitioner's trial depends is petitioner's assertion that David Leitch told law enforcement officials, prior to petitioner's trial, that on the night of the murder, Leitch returned briefly to the apartment and saw petitioner and Fleischli on the floor of the apartment having consensual sex. On close examination of the declarations submitted by petitioner in support of this claim, however, it becomes clear that in fact petitioner has not submitted evidence that Leitch actually told law enforcement officials any such thing prior to petitioner's trial. The declaration that comes closest to making the required factual showing is that of Tamar Todd, a paralegal employed by the Federal Public Defender. Pet'r Ex. 2. Todd declares that she spoke with Leitch on June 19, and June 26, 1997, at the prison where he is housed. Id. ¶ 2. She recounts what Leitch told her about events on the night of the murder. Id. ¶¶ 2-3. Of course, what Leitch told Todd in 1997 about events that night is not relevant to what Leitch might or might not have told the police in 1981 or 1982, and these statements, even if taken as true, do not lay the factual foundation for a Brady claim. However, in ¶ 4, Todd declares:

> According to Mr. Leitch, prior to trial he had told his trial attorney, Ronald Kreber, that when he returned to the apartment, he saw Mr. Thompson and Ginger having consensual sex and then left. Mr. Leitch stated that he also believed that he told these facts to the police officers who were investigating the case.

Id. ¶ 4 (emphasis added).

The first sentence, if taken as true, establishes only that Leitch told this to his attorney "prior to trial." It is not clear whose trial is being referred to, but it is reasonable to assume that this is a reference to Leitch's trial. It is the second sentence of this declaration that contains the totality of petitioner's evidentiary support for his claim that the State illegally suppressed evidence at petitioner's trial: Leitch told

Todd "that he also believed that he told these facts to the police officers who were investigating the case." (emphasis added). Since in the remainder of the declaration, Todd describes everything Leitch told her as though Leitch had stated it directly, it is reasonable to assume that the use of the word "believed" here represents a deliberate choice, either by Leitch or by Todd, indicating a lower level of confidence in the accuracy of this particular assertion than in the accuracy of the other assertions described in the declaration. Moreover, this sentence does not state when Leitch believes that he told these facts to the police officers.

Petitioner tries to bolster the Leitch hearsay contained in the Todd declaration with a declaration from Charles Gillespie, an investigator for the Federal Defender for the Eastern District, which describes the hearsay statements of Floyd Owens, one of the Orange County Sheriff's detectives who originally investigated the Fleischli homicide. See Pet'r Ex. 4. Gillespie states that Owens told him that Leitch had informed Owens during Owens' initial investigation of the case that Leitch had observed petitioner and Fleischli engaged in consensual sex in the early morning of September 12, 1981. Id., ¶ 2. Petitioner alleges that Leitch gave this information to Owens no later than August 1982, but it was never provided to petitioner or petitioner's trial counsel.

However, in a subsequent declaration submitted by respondent in which Owens evidently decides to speak for himself, Owens declares that he heard this account that the sex was consensual prior to August 1982, he but does not believe that he heard it from Leitch directly. Resp't Ex. A, ¶ 3. Owens also declares that he told petitioner's habeas attorney and his investigator when he spoke to them previously that he did not believe he had heard this information from Leitch. Id. Instead, Owens believes that he heard it from someone in the Orange

County District Attorney's Office. Id. Thus Owens' declaration refutes the declaration of Gillespie.[1]

Michael Jacobs, the deputy district attorney who prosecuted both Thompson and Leitch, declares that the only version of the murder which he is aware of that involved a suggestion of consensual sex came from a jailhouse informant. Resp't Ex. C, Jacobs decl. at ¶ 4. The statement of the jailhouse informant, David Vogel, was provided to petitioner in discovery. Vogel testified at petitioner's preliminary hearing. Id. Prior to petitioner's trial, Jacobs met with Owens and the other sheriff's deputy who investigated the case, at which time Vogel's version of the events was discussed. Id.

Owens now declares that in all probability he heard the consensual sex version of the crime during discussions with the trial prosecutor regarding a jailhouse informant's version of the crime. Resp't Ex. A, Owens decl. at ¶ 7. While Owens admits that he did speak to Leitch one or two times at the request of Leitch's mother because he was experiencing personal problems, Owens declares that the contents of such conversations related only to Leitch's personal problems. Id. at ¶ 4. Owens states:

> I am certain that I did not discuss the facts of the Fleischli rape/murder with him. I was well aware that Leitch was represented by attorney Ronald Kreber at that time, and would never have engaged in any discussion relating to the facts of a case with a homicide suspect who had appointed counsel. If

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1. In addition to the alleged non-disclosure by Owens of a statement by Leitch as to his seeing petitioner and Fleischli engage in consensual sex, Gillespie declares that Owens stated that he was not at all certain that Fleischli had been raped. Owens clarifies this statement that Gillespie attributed to him stating that at the time he was responding to a question as to what Leitch believed about the rape charge, and Owens was only guessing as to what Leitch said about the rape charge. Resp't Ex. A, at ¶ 6.

anything unsolicited had been brought up during the conversation, I am confident I would have written a report on the matter . . .

Id.

While petitioner points suspiciously to the lack of reports prepared by Owens regarding the unofficial visits Owens made to Leitch at the request of Leitch's mother, Owens' declaration is also supported by Jacobs, the trial prosecutor, who declares that he has reviewed voluminous Sheriff's Department investigation reports in preparing his declaration and he did not find any reference to Leitch ever providing the alleged "new evidence" to law enforcement.[2]

Since Owens' declaration contradicts the declaration of Gillespie, petitioner only has Leitch's statement to Todd that he believes that he told these facts to the police officers who were investigating the case. Pet'r Ex. 3, Todd decl. at ¶ 4. Leitch did not say that he reported these facts to the police officers when he provided this version of the murder at his parole hearing in January 1995. Nor has Leitch ever made such statments in any of his other parole hearings. Interestingly, Leitch did not mention anything during his last parole hearing about seeing Fleischli alive in the studio apartment after the point in the evening when he dropped off Fleischli and petitioner at another bar, and he left with his ex-wife, Tracy Leitch. See Resp't Ex. K, Transcript of Leitch's Parole Hearing of Jan. 28, 1997, at 13-19.

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2. Jacobs also points out that a review of the transcript recordings of Leitch's jailhouse conversations with his ex-wife did not reveal the information that Leitch disclosed during a 1995 parole hearing and during an interview with habeas counsel's paralegal in June 1997, and purportedly disclosed to law enforcement during the homicide investigation. Resp't Ex. C at ¶ 5.

2. Even If Leitch Made Such A Statement To The Police Before Petitioner's Trial, Petitioner Was Not Prejudiced By The State's Failure To Disclose It.

Even if Leitch did tell the police prior to petitioner's trial that he had observed petitioner and Fleischli engaged in consensual sex, petitioner was not prejudiced by the absence of this statement from his original trial.[3] The test is whether the absence of this evidence worked to petitioner's "*actual* and substantial disadvantage, infecting his entire trial with error of constitutional dimensions.'" Murray, 477 U.S. at 494 (quoting Frady, 456 U.S. at 170).

In the hearsay declaration provided by Todd, several statements are attributed to Leitch. Leitch purportedly told Todd that he returned to the apartment around 3:15 or 3:30 a.m., and that he observed Fleischli and petitioner having sex on the floor towards the center of the room. He allegedly stated that there was nothing to indicate that a rape was occurring, and that Leitch believed it was consensual intercourse so he left the apartment. Pet'r Ex. 2, Todd decl. at ¶ 2-3.

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3. Assuming that Leitch made the statement to the police, petitioner can establish cause for his failure to discover this evidence, since the State never disclosed the statement. Because in respondent's view, the evidence does not exist, respondent's position on cause is that "Thompson's failure to discover his crime partner's nonexistent statement to law enforcement in 1982, is readily understandable . . . ," since "you can hardly discover through diligence, or otherwise, what does not exist." Resp't Suppl. Opp'n at 6:7, 5:11. To reach the cause question and ask whether petitioner has cause for his failure to present evidence earlier, it is necessary to assume that the evidence *exists*. If the evidence does not exist, cause and prejudice is not even the right question to ask; instead, there simply is no claim based on newly discovered evidence, because there is no newly discovered evidence. If there is no claim, there is no reason even to engage in the McCleskey analysis.

Leitch also purportedly told his own trial counsel that he did return to the apartment the night Fleischli was killed, and that he saw petitioner and Fleischli having consensual sex. The fact that Leitch made this statement was told to petitioner's federal habeas counsel by Ronald P. Kreber, who represented Leitch at his trial. Pet'r Ex. 3, Love decl. at ¶ 3. Kreber told Pamela Ratner, a Supervising Deputy Attorney General, that he does not remember Leitch providing any additional details other than he did not believe anything was "unusual" at the time. Resp't Ex., Ratner decl. at ¶ 5. Kreber never disclosed this statement to any member of law enforcement or to a member of the prosecution. The only way this evidence could have been offered was through Leitch, and a decision was made that Leitch would not testify. Id. at ¶ 7.

These statements accorded to Leitch are contradicted by prior statements Leitch made to the police, the 1981 recorded conversations Leitch engaged in with his ex-wife in jail, petitioner's own trial testimony and the physical evidence in the case. While petitioner cites Leitch's statements as corroborating of his version of the events surrounding the murder of Fleischli, these statements are actually contradictory and inconclusive. Thus, even if Leitch did tell such an account to the police during their initial investigation of the Fleischli homicide, and even if Leitch's statement had been read at petitioner's trial, it would have failed to "provide a convincing account of what took place" on the night Fleischli was murdered. Herrera v. Collins, 506 U.S. 390, 418 (1993).

(a) Leitch's newly discovered statements conflict with petitioner's trial testimony.

Leitch's newly discovered statements put petitioner and Fleischli having sex in the middle of the room. However this directly conflicts with petitioner's testimony that he had sex with Fleischli on the night she was killed on the bunk where

petitioner usually slept. XVII RT 2320-21. The bunk was clearly located against a wall of the studio apartment, not in the middle of the room. Resp't Ex. C [diagram].

(b) Leitch's newly discovered statements are contradicted by the physical evidence in the case.

While Leitch did not observe any screaming during the brief moment that he allegedly observed petitioner and Fleischli having sex, this does not establish that rape did not occur. The Ninth Circuit found that the "State presented a strong rape case during the state trial," and petitioner's own testimony "did severe damage to his defense." Thompson v. Calderon, 109 F.3d 1358, 1365-66 (9th Cir. 1996). The circuit elaborated, stating:

> On the question of consent, the condition of the body provided compelling evidence of rape. Someone had cut Fleischli's shirt and bra up the middle and pulled them down to her elbows, placing her in a position consistent with restraint during a rape. Thompson suggested at trial that someone could have done this after killing her in order to facilitate moving the body, but the body was otherwise secured by the blanket, tape and ties. No logical inference supported exposing her breasts and restraining her in this fashion merely in order to move her dead body. Fleischli wore no shoes, socks or underwear, and her jeans had been fully zipped but not buttoned. She also suffered a severe crushing injury to her right wrist at or near the time of her death.

Id. at 1365 (emphasis added).

In addition, petitioner himself provided one reason that there would not have been any screaming. During trial

petitioner was asked questions to follow up on his defense that he slept through the entire murder which occurred in the same room in which he claimed to be sleeping. When questioned about how he could awake based on the sound of the clicking of the hammers of the guns of the Mexican police, and how that sound could be louder than the sounds a woman would make when her clothes are being ripped and a knife is being plunged into her head, petitioner answered: "The People's evidence indicates she was - her mouth was taped. Maybe the noise was muffled, I don't know. How could I know." XVIII RT 2442.

In light of the strong evidence of rape, the absence of Leitch's newly discovered statements would not have infected petitioner's trial or any of his other post-conviction proceedings with an error of "constitutional dimension." Frady, 456 U.S. at 170.

(c) Leitch's statements are not credible or trustworthy.

Leitch's statements are not consistent with his testimony given at other parole hearings as well as his reported statements to law enforcement officers at the time of the homicide investigation. Leitch apparently had several stories, the first being that on the night of the murder he went back to his apartment to sleep, and neither petitioner nor Fleischli was present. A second version was later given in which Leitch returned to the apartment after Fleischli was already dead and wrapped up in a blanket. Nor does Leitch's purported observation dispositive on the issue of consent based on his brief view. As Leitch himself testified in a 1990 parole hearing, his "judgment was way off" and that on the night of the murder he had been drinking all night. Resp't Ex. G at 69. Therefore petitioner's reliance on Leitch's powers of observation on the night in question is misplaced.

It should also be noted that Leitch's newly discovered version of the events on the night in question were not shared with his visitors at jail. Leitch was apparently unaware that he was being recorded, yet he never mentioned that he observed petitioner and Fleischli having sex. In particular when he was talking with his ex-wife, Tracy Leitch, she asked questions to which Leitch's answers directly contradict his newly discovered version of events. For instance Tracy Leitch asked if Leitch had engaged in sex with Fleischli, which he denied, and when Tracy told him that Fleischli was raped he feigned surprise. Resp't Ex. D, Transcript of Meeting with Tracy Leitch and David Leitch, at 34. Leitch also clearly stated that he was not there when the murder happened, but that when he came home "it" was already there. Id. Later in the conversation, Leitch opined that petitioner probably tried to rape Fleischli, while Tracy Leitch stated that Fleischli probably would have agreed to have sex unless he tried to rape her. Leitch then stated "I don't know. He's nuts. He has fucking flipped." Id. at 39.

Finally, it is clear that Leitch's allegedly newly discovered statements are not consistent with the testimony he has furnished at his other parole hearings, both before and after the January 1995 hearing. He stuck to the story that he walked into his apartment and found his roommate with a dead body in his parole hearing of January 3, 1990. Resp't Ex. G, at 65. This was the same story he told at his parole hearing on January 9, 1991 when he confirmed that he was gone from the apartment all night, and did not return until the next morning. Resp't Ex. H, at 74. Leitch opted not to add any comments regarding the facts of the crime at his parole hearing on February 10, 1992. Resp't Ex. I, at 77. At his parole hearing on December 10, 1992 Leitch speculated that petitioner killed Fleischli "because he raped her and didn't want anyone to know, and he wanted to cover it up by killing her." Resp't Ex. J, at 80. Finally at his most recent parole hearing Leitch testified consistently with the version of events that he returned to his apartment to find Fleischli already dead. Resp't Ex. K, at 88. In light of the

inconsistent statements made by Leitch, there is no showing that Leitch's statements made in 1995 are any more credible that his testimony at the other parole hearings.[4] Leitch's newly discovered statements, when considered in conjunction with the physical evidence, and petitioner's own testimony at trial, does nothing to support a conclusion that petitioner was actually and substantially disadvantaged by the lack of this purported evidence. Frady, 456 U.S. at 170.

B. Leitch's Statement To The Parole Board In 1995

Unlike Leitch's alleged statement to law enforcement prior to petitioner's trial, it is undisputed that Leitch told his parole board on January 4, 1995, that at some point during the evening of Fleischli's murder, he returned to the apartment, "opened up the door and looked in there, and it was like people were having sex, so I left." Pet'r Ex. 5. Leitch also stated that petitioner and Fleischli were having sex on the floor, in about the same place where Fleischli was later killed, and that Fleischli was not screaming when he saw her. Id. Respondent does not dispute that Leitch made these statements; but rather argues that they prove nothing. Thus, the question is whether, to the extent that petitioner's new claim for relief is based on the State's alleged suppression of Leitch's parole board statements, petitioner has cause for failing to raise the claim earlier, and whether petitioner has been prejudiced by the alleged suppression.

4. Leitch himself has repeatedly refused to speak with petitioner's federal habeas counsel, and has not submitted a declaration regarding his version of the events. However he ultimately agreed to sign a release to permit petitioner's federal habeas counsel to talk to his previous attorneys. Pet'r Ex. 6, Denvir decl ¶ 12-22. A paralegal from Denvir's office visited petitioner to obtain his signature on the release on June 19, 1997. Id. at ¶ 22; Pet'r Ex. 2, Todd decl at ¶ 2.

1. Petitioner Was Never Prevented From Discovering Leitch's Parole Board Statements.

The Supreme Court has defined cause as requiring the petitioner "to show that 'some objective factor external to the defense impeded counsel's efforts' to raise the claim" at the appropriate time. McCleskey, 499 U.S. at 493 (quoting Murray v. Carrier, 477 U.S. 478, 488 (1986)). This is because "[a]buse-of-the-writ doctrine examines petitioner's conduct: The question is whether petitioner possessed, or by reasonable means could have obtained, a sufficient basis to allege a claim in the first petition and pursue the matter through the habeas process." Id. at 498 (emphasis in original).

Petitioner contends that the statements made by Leitch during a January 1995 parole hearing should have been disclosed by the State.[5] Respondent asserts that there was no misconduct or fraud which is the standard under Fed. R. Civ. P. 60(b) for determining whether petitioner should be relieved from this Court's prior judgment on his habeas petition. However, since the Rule 60(b) motion must be evaluated under the cause and prejudice standard, the Court has examined whether there was cause for the failure to assert the claim earlier. Petitioner relies on what he believes is suppression by

5. The statements made by Leitch during his 1995 parole hearing were not supported by many details. When asked how Leitch knew that it was Fleischli wrapped up on the floor Leitch stated "Because when I came in the apartment earlier, it looked like somebody were having sex out in the middle of the apartment, so I left, and I came back later." Pet'r Ex. 5, Transcript of Jan. 4, 1995 parole hearing for Leitch at 294. When asked if Fleischli was already dead with he observed her having sex with petitioner, Leitch answered no, and explained "it was like people were having sex, so I left." Id. He then confirmed that it was on the floor in just about the place she was later killed, and that she was not screaming. Id. at 295. Leitch then stated that he did not know whether Fleischli resisted, and that was the reason that petitioner killed her. Id.

the State of the evidence, citing several cases which rely on Brady v. Maryland, 373 U.S. 83 (1963), and pointing out that the State has an ongoing duty to disclose evidence favorable to the defense. Thomas v. Goldsmith, 979 F.2d 746, 749-50 (9th Cir. 1992).

To demonstrate a Brady violation, petitioner must "show that the government withheld material, exculpatory evidence." United States v. Zuno-Arce, 44 F.3d 1420, 1425 (9th Cir. 1995), cert. denied, 116 S. Ct. 383 (1995). However, when "a defendant has enough information to be able to ascertain the supposed Brady material on his own, there is no suppression by the government." United States v. Aichele, 941 F.2d 761, 764 (9th Cir. 1991) (citing United States v. Dupuy, 760 F.2d 1492, 1501 n.5 (9th Cir. 1985)); see also United States v. Bracy, 67 F.3d 1421, 1428-29 (9th Cir. 1995) (finding government's "disclosure provided all the information necessary for the defendants to discover the alleged Brady material on their own, so the government was not guilty of suppressing any evidence favorable to [petitioner]").

"[S]uppression by the Government is a necessary element of a Brady claim, [so] if the means of obtaining the exculpatory evidence has been provided to the defense, the Brady claim fails." Dupuy, 760 F.2d at 1501 n. 5 (internal citations omitted); accord United States v. Gonzales, 90 F.3d 1363, 1368 (8th Cir. 1996) ("government need not disclose evidence available to the defense from other sources or evidence already possessed by the defendants"); Westley v. Johnson, 83 F.3d 714, 725-26 (5th Cir. 1996) (no *Brady* violation if the defendant, "using reasonable diligence, could have obtained the information"), cert. denied, 117 S. Ct. 773 (1997); United States v. Payne, 63 F.3d 1200, 1208 (2d Cir. 1995), cert. denied, 115 S. Ct. 1056 (1996); Felker v. Thomas, 52 F.3d 907, 910 (11th Cir. 1995), aff'd on other grounds, 116 S. Ct. 2333 (1996); Stockton v. Murray, 41 F.3d 920, 927 (4th Cir. 1994) ("Brady does not compel the disclosure of evidence available to the defendant from other sources,

including diligent investigation by the defense"), cert. denied, Stockton v. Angelone, 116 S. Ct. 37 (1995); United States v. White, 970 F.2d 328, 33[illegible] (7th Cir. 1992).

Here it is clear that petitioner knew that Leitch, as petitioner's co-defendant, was a material witness in the case. Indeed petitioner's federal habeas counsel had previously attempted to interview Leitch regarding the circumstances of the crime. Pet'r Ex. 6, Denvir decl. at ¶ 12. When it came time for petitioner's clemency hearing, federal habeas counsel turned to the parole board transcripts as a possible source of support for petitioner. Id. at ¶ 11. This is dispositive of the issue as "[t]he prosecution is under no obligation to turn over materials not under its control." Achillea, 941 F.2d at 764 (finding no Brady violation where the state provided rap sheet for government witness, but did not turn over impeachment evidence contained in the witness's prison file) (citing United States v. GATT, 763 F.2d 1040, 1049 (9th Cir. 1985)).

2. Petitioner Has Not Shown Prejudice From His Failure to Discover Leitch's Parole Board Testimony Earlier.

"Once the petitioner has established cause, he must show 'actual prejudice' resulting from the errors of which he complains." McCleskey, 499 U.S. at 494 (some internal quotation marks omitted) (quoting United States v. Frady, 456 U.S. 152, 168 (1982)). "The habeas petitioner must show 'not merely that the errors at . . . trial created a possibility of prejudice, but that they worked to his actual and substantial disadvantage, infecting his entire trial with error of constitutional dimensions.'" Murray, 477 U.S. at 494 (emphasis original) (quoting Frady, 456 U.S. at 170).

For the same reasons that support a finding that Leitch's statements are not credible or trustworthy, petitioner was not

prejudiced by the lack of presentation of Leitch's 1995 parole board testimony.

E. Petitioner's Execution Will Not Be A Fundamental Miscarriage of Justice.

Even if a petitioner cannot meet the cause and prejudice standard to allow him to file a second petition raising a new claim, "the failure to raise the claim in an earlier petition may nonetheless be excused if [the petitioner] can show that a fundamental miscarriage of justice would result from a failure to entertain the claim." McCleskey, 499 U.S. at 494-95. "These are extraordinary instances when a constitutional violation probably has caused the conviction of one innocent of the crime." Id. at 494 (emphasis added).

The standard petitioner must meet is that "the constitutional error 'probably' resulted in the conviction of one who was actually innocent. Schlup v. Delo, 115 S. Ct. 851, 864, 867 (1995). "To establish the requisite probability, the petitioner must show that it is more likely than not that no reasonable juror would have convicted him in light of the new evidence." Id. at 867. This showing is a "stronger showing than that needed to establish prejudice." Id. (emphasis added).

Since petitioner did not satisfy the cause and prejudice inquiry of McCleskey, petitioner certainly cannot make the requisite showing that he is actually innocent such that his execution would be a miscarriage of justice. The Supreme Court has characterized this showing as "truly extraordinary," Id. (citing McCleskey, 499 U.S. at 494), and the evidence petitioner has marshaled at the last minute in an attempt to prevent his execution amounts to one version of events, offered sporadically over the years by petitioner's co-defendant Leitch, which is contradicted both by some of Leitch's other statements, as well as the compelling physical evidence of rape, simply cannot meet the standard set forth in Schlup.

Moreover, as the Herrera Court pointed out "[h]istory shows that the traditional remedy for claims of innocence based on new evidence, discovered too late in the day to file a new trial motion, has been executive clemency." Id., 506 U.S. at 416-17.

For the reasons stated above, petitioner's Motion for Relief from Judgment Pursuant to Federal Rule of Civil Procedure 60(b) is DENIED. Accordingly, Petitioner's Application for a Stay of Execution is also DENIED.

IT IS SO ORDERED.

Dated: July 25, 1997.

DICKRAN TEVRIZIAN,
United States District Judge

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

THOMAS MARTIN THOMPSON,
Petitioner-Appellant,

v.

ARTHUR CALDERON, Warden
of the California State Prison at San Quentin,
Respondent-Appellee.

ORDER
Filed July 28, 1997

Before: BEEZER, HALL and LEAVY, Circuit Judges.

Petitioner, Thomas M. Thompson, by and through his attorneys, has filed an emergency motion under Circuit Rule 27-3 to recall the mandate and for a stay of execution. Our opinion in this appeal was filed on June 19, 1996, as amended March 6, 1997 and is reported at 109 F.3d 1358 (9th Cir. 1996). A petition for certiorari was filed in the Supreme Court of the United States on behalf of the petitioner and the petition was denied. In compliance with Fed. R. App. P. 41(b), our mandate issued on June 11, 1997.

The petitioner now asserts that there is "newly discovered evidence confirming that petitioner had consensual intercourse with, and did not rape, Ginger Fleischli." Petitioner says that even if his newly discovered evidence is challenged by the state, the state withheld evidence from the petitioner and that the

discovery of such evidence will materially affect our opinion with respect to "prejudicial ineffective assistance of counsel."

When we consider the record on which our opinion was based, there is no record evidence before us with respect to claims which petitioner now makes in his petition to recall the mandate. These matters have never been considered by the district court,[1] this court or the United States Supreme Court.

Petitioner has raised the claim of newly discovered evidence in a Petition for Habeas Corpus filed with the Supreme Court of California. The California Supreme Court's order entered in In re Thompson, No. 5062592 (July 16, 1997), says:

> The petition for writ of habeas corpus is denied on the merits. In addition, "Claim C" (asserted juror bias) is barred as untimely: that claim is substantially delayed without good cause (In re Clark (1993) 5 Cal.4th 750, 782-787; In re Swain (1949) 34 Cal.2d 300, 302), and it falls within none of the exceptions to the bar of untimeliness (In re Clark, supra, 5 Cal.4th at pp. 797-793). Contrary to assertions of the Attorney General, neither "Claim A" (asserted newly discovered evidence) nor "Claim B" (asserted failure to disclose material exculpatory evidence) is substantially delayed.
>
> The motions for discovery and for a stay of execution are denied.
>
> Mosk, J., is of the opinion that a stay of the judgment should be granted and that an order to show cause as to the special circumstance only should be issued returnable before the superior court.

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1. Counsel for petitioner advises us that a Fed. R. Civ. P. 60(b) motion has been filed in the district court.

The issues decided by the Supreme Court of California are not considered in our previously filed opinion. Furthermore, we have no record in support of the new claims made in the petition to recall the mandate.

The absence of a factual record inhibits our ability to consider whether to recall our mandate in this case. We have the power to recall our mandate, but we will only exercise this power in "exceptional circumstances." Greenawalt v. Stewart, 105 F.3d 1268, 1276 (9th Cir.)(citation omitted), cert. denied, 117 S. Ct. 794 (1997). Generally, nothing less than an intervening change in the law by statute or Supreme Court decision qualifies as "exceptional circumstances" that justify recall of our mandate. See, e.g., Malik v. Brown, 65 F.3d 148, 149 (9th Cir. 1995) (statute); United States v. Davis, 36 F.3d 1424, 1429-30 (9th Cir. 1994) (Supreme Court decision), cert. denied, 513 U.S. 1171 (1995); Bryant v. Ford Motor Co., 886 F.2d 1526, 1529-30 (9th Cir. 1989) (statute); Zipfel v. Halliburton Co., 861 F.2d 565, 567-68 (9th Cir. 1988) (Supreme Court decision); Verrilli v. City of Concord, 557 F.2d 664, 665 (9th Cir. 1977) (statute and Ninth Circuit decision); United States v. Amartseff, 435 F.2d 1312, 1312 (9th Cir. 1970) (Supreme Court decision); see also Adamson v. Lewis, 955 F.2d 614, 619-20 (9th Cir. 1992) (refusing to stay mandate because Supreme Court decision would not change the case's outcome). Upon a change in the law, the existing factual record is adequate to determine whether our prior decision serves justice. Where a party, as here, alleges relevant new facts, a more complete evidentiary record is necessary.

There are alternative means for Petitioner to present these new facts for review. Petitioner may make a motion to the district court seeking relief from the judgment based on newly discovered evidence, as counsel advises us it has done. See Fed. R. Civ. P. 60(b)(2).[2] Petitioner may file a second petition for

2. But note that "where a habeas petitioner tries to raise new facts or new claims not included in prior proceedings in a Rule 60(b) motion, such motion should be treated as the equivalent of a second petition for writ of habeas corpus." Clark v. Lewis, 1 F.3d 814, 825 (9th Cir. 1993); see also Felker v. Turpin, 101 F.3d 657, 661 (11th Cir.) (applying the restrictions of the Antiterrorism and Effective Death Penalty Act to Rule 60(b) motions), cert. denied, 117 S. Ct. 451 (1996).

habeas corpus after moving this court for authorization under 28 U.S.C. § 2244(b)(3)(A). See Swan v. Peterson, 6 F.3d 1373, 1384-85 (9th Cir. 1993) (addressing newly discovered evidence as a ground for federal habeas corpus relief). Both of these options would provide a hearing of the factual issues alleged by Petitioner in this case and ultimately provide us with an appropriate record to review. Because such a record is not available, it is

ORDERED that the motion to recall the mandate and for stay of execution are denied without prejudice to any other proceedings.

ORDER
Filed July 30, 1997

[Caption Omitted in Printing]

Before: HUG, Chief Judge.

A majority of the active judges has voted to take this matter en banc. On March 6, 1997, a panel of our court reversed the district court's grant of habeas relief. An en banc vote was not taken before the mandate issued. The full court has voted to consider whether to recall the mandate to consider whether the panel decision of our court would result in a fundamental miscarriage of justice.

Oral argument will be held in San Francisco at the Seventh and Mission Courthouse on Friday, August 1, 1997, at 11:00 a.m. The parties should be prepared to discuss fully the merits of the appeal from the district court's decision issuing the writ of habeas corpus, dated March 29, 1995, including the issues of ineffective assistance of counsel and prosecutorial misconduct. The parties may, at their option, file 20 copies of briefs of not more than 15 pages on or before 5:00 p.m., Thursday, July 31, 1997. No oral argument will conducted regarding the appeal from the denial of the 60(b) motion.

BEEZER, Circuit Judge, with whom Hall, Brunetti, Trott and Kleinfeld, Circuit Judges, join dissenting:

A majority of the active judges of the court have authorized an en banc court to reconsider an order denying the motion to recall the mandate which issued from this court June 11, 1997.

We issued the mandate in compliance with Fed. R. App. P. 41(b) after the United States Supreme Court denied a petition for certiorari seeking review of the opinion in Thompson v. Calderon, 109 F.3d 1358 (9th Cir. 1997). On July 22, 1997, Thompson moved this court for an order recalling the mandate, asserting "newly discovered evidence confirming that petitioner had consensual intercourse with, and did not rape, Ginger Fleischli." Thompson further asserted that this evidence was withheld by the state and undercuts our prior holding that there was no prejudical ineffective assistance of counsel. Thompson's motion was denied by a panel order filed on July 28, 1997.

The en banc court has not advised the parties whether the court intends to limit its reconsideration to the petitioner's motion to recall the mandate, whether it intends to reconsider matters which the Supreme Court considered when it denied the petition for certiorari or whether it intends to consider setting aside the penalty of death based on the newly discovered evidence claim.

If the en banc court limits the scope of its reconsideration to recall the mandate and, in fact, recalls the mandate, such an order will have several consequences.

First, when the mandate is recalled, a first petition for writ of habeas corpus will be actively pending before the court. Our death penalty rules expressly provide for a stay of execution while the court considers the merits of the pending motion. Ninth Circuit Rule 22-4(c) provides, in part: "When the panel affirms a denial or reverses a grant of a first petition or motion,

it shall enter an order staying the mandate pursuant to FRAP 41(b)." Without respect to the circuit rule an en banc court can consider entry of a stay of execution. Since Thompson's pending application for recall of the mandate is, in practical effect, a second or successive petition, the standard to be applied is set down by the Supreme Court in Delo v. Blair, 509 U.S. 823, 823 (1993), as follows:

> It is an abuse of discretion for a federal court to interfere with the orderly process of a State's criminal justice system in a case raising claims that are for all relevant purposes indistinguishable from those we recently rejected in Herrera [v. Collins, 506 U.S. 390 (1993)]. Accordingly, the Court of Appeals' stay must be vacated.

The California Supreme Court denied Thompson's petition for writ of habeas corpus claiming newly discovered evidence on the merits. In re Thompson, No. S062592 (Cal. July 16, 1997).

Second, there is no recorded new evidence before the court upon which to set aside jury verdicts finding Thompson guilty of murder and rape and finding him subject to imposition of the death penalty.

Third, if the claim of newly discovered evidence is considered as made in a first petition rather than in a second or successive petition, the petitioner will be relieved of the constraints imposed by the Antiterrorism and Effective Death Penalty Act of 1996. In Nevius v. Sumner, 105 F.3d 453, 461 (9th Cir. 1996), we make plain the abuse which flows from a recall of the mandate in a capital case. Writing for our court, Judge Canby says:

> Nevius' motion suffers from the fact that it is not grounded in any real infirmity in our previous decision, either when it was entered or when it is viewed in the

> light of later Supreme Court decision. Nevius wants us to recall our mandate in Nevius I not to nullify an erroneous decision, but to reopen the proceeding so that he may present new claims that now cannot be addressed in a subsequent petition. The reasons that those claims cannot be addressed in a second petition are that severe limits have been placed on second petitions by the Supreme Court in McCleskey v. Zant, 499 U.S. 467, 111 S. Ct. 1454, 113 L.Ed.2d 517 (1991), and by Congress in the Antiterrorism and Effective Death Penalty Act of 1996, 28 U.S.C. §2244(a), (b). To grant Nevius' motion simply to avoid the effect of those two procedural bars would thoroughly undermine McCleskey and the Act. That we may not do.

Id.

We conclude that recall of the mandate based on asserted newly discovered evidence is improper relief to be granted by an en banc court just as the grant of a Fed. R. Civ. P. 60(b) motion would be improper in a district court. Clark v. Lewis, 1 F.3d 814, 825-26 (9th Cir. 1993). The sole avenue available to Thompson at this stage of the procedural history of this case is to make application to this court for permission to file a second or successive petition for a writ of habeas corpus in compliance with the Antiterrorism and Effective Death Penalty Act of 1996.

We respectfully dissent from the order granting en banc consideration.

Trott, Circuit Judge, with whom KLEINFELD, Circuit Judge, joins dissenting:

The vote to take en banc the panel's manifestly correct determination that the mandate in this case is not subject to recall amounts to seizing in our judicial mouths not only the bit, but also the rules, the due process, and our General Orders that govern our handling of appeals. As Judge Beezer correctly illustrates, we have lost our lawful authority over Thompson's appeal. Hence, our power to reopen what has already been done no longer exists. Thus, I concur in Judge Beezer's dissent.

Unlike the weather, we are sworn to adhere to the rules and to behave in a predictable and regular way. This requirement is the very essence of due process of law. Yet here, as the judicial equivalent of Edward Lorenz's butterflies, we import the equivalent of chaos into our process and procedures, throwing normalcy to the wind. To borrow further from James Gleick's book "Chaos," somehow "nothing ever happen[s] the same way twice" in a case involving capital punishment.

In my view, these are reasons for the periodicity and unpredictability of our court in these kinds of cases, just as there is an eerie order in chaos itself, but suffice it to say that our freewheeling approach here is inconsistent with the Eighth Amendment's command that arbitrariness not be a part of the process by which the death penalty is administered. Given the recent history Thompson's appeal not only in our court but thereafter in the Supreme Court, to label these circumstances as "exceptional" and thus to justify recalling the mandate would be the equivalent of hijacking the term. Inappropriate nomenclature and labels threaten to carry the day and to eclipse the substance of the issue. I'm keenly aware that this is a case involving a person's life or death, but I am equally aware of our responsibility not to permit that concern to run roughshod over

our bedrock commitment to due process of law, a process which sets us apart from most governments on the face of the Earth.

A properly constituted panel of this court has heard and decided Thompson's appeal. The time to review that decision en banc has come and gone. The Supreme Court has declined to review the panel's and this court's decision. The mandate has issued. If that is not finality I do not know what is. Should Thompson have something new to bring to us in this sixteen-year-old case, he should do so pursuant to the lawful avenues provided for such an occasion, not expect us to lay bare the forest on his behalf.

This decision brings us face to face with our oath of office which requires us to support and to defend the Constitution and the laws of the United States. In this confrontation, ask not for whom the bell tolls: it tolls for thee.

APPELLANT THOMAS M. THOMPSON'S BRIEF
IN SUPPORT OF EN BANC REVIEW
Filed July 31, 1997

[Caption Omitted in Printing]

Petitioner hereby submits additional argument that failure to recall the mandate and to rehear the merits of this appeal would be manifestly unjust. We begin with the procedural objections advanced by the dissent.

The dissent would exclude Petitioner's declarations and documentary evidence on the grounds that they: (1) pertain to facts outside the record on appeal; (2) relate only to issues not presented by the appeal; and (3) violate procedural limits on introducing new evidence in habeas corpus cases. Thus, Petitioner's motion to recall the mandate amounts to nothing more than an untimely petition for rehearing of the merits of the appeal, which the Court allegedly lacks authority to grant. None of these objections is well-founded.

1. *A Court of Appeals Has Jurisdiction to Recall its Mandate at Any Time.*

The power of a court of appeals to recall a mandate once issued has long been recognized, and there exist no formal rules limiting that power. 16 Wright, Miller & Cooper, Federal Prac. and Proc., § 3938 at 712. All judgments "are under the control of the court which pronounces them during the term at which they are rendered or entered of record, and they may then be set aside, vacated, modified, or annulled by that court." Bronson v. Schulten, 104 U.S. 410, 415 (1881). The expiration of a term or session of a court is no longer significant, 28 U.S.C. § 452, and the courts of appeals have inherent power to recall their mandates "without limit of time." Patterson v. Crabb, 904 F.2d 1179, 1180 (7th Cir. 1990). The power to recall the mandate is not created by statute, but "exists as part of the court's power to

protect the integrity of its own processes." Zipfel v. Halliburton Co., 861 F.2d 565, 567 (9th Cir. 1988). "[T]he Federal Rules of Appellate Procedure and [the local rules], including the time periods associated with those rules, are not applicable" to a motion to recall mandate. A to Z Portion Meats, Inc. v. NLRB, 643 F.2d 390, 392 n.1 (6th Cir. 1980).

To the extent that the dissent relies on the asserted preclusive effect of the prior denial of rehearing en banc, the denial of certiorari, and the issuance of the mandate, the following should be noted. The mandate in Petitioner's case was spread on July 18, only 13 days ago. "[O]ffense to repose may be justified if recall is granted quickly." Wright & Miller, § 3938 at 732. "The denial of a writ of certiorari imports no expression of opinion upon the merits of the case . . . ." United States v. Carver, 260 U.S. 482, 490 (1923). Moreover, the standard for granting certiorari is significantly different from the standard for granting rehearing or for recalling a mandate. See Rule 10, Supreme Court Rules. That this case was not reheard en banc earlier was not the result of a vote to deny rehearing, but merely the result of default. See Order Granting Rehearing En Banc at 1 (an en banc vote "was not taken" before the mandate issued). Had a vote been taken, the Court perhaps would be entitled to accord some deference to the prior denial as the result of a deliberative process. See General Order 5.5 (regarding circulation of memoranda and voting). In the absence of these procedures, there can be no inference that the full Court made any assessment of the merits of Petitioner's claims.

Thus, this Court has the *power* to recall the mandate and rehear the merits of Petitioner's appeal based solely on a firm and abiding conviction that the previous judgment is erroneous. "[N]o judicial sin is worse than issuing a judgment the judge knows to be wrong on the facts or law." Jeffries v. Wood, 114 F.3d 1484, 1510 (9th Cir. 1997)(en banc)(Kozinski, J., dissenting). As discussed below, this case presents far greater extraordinary circumstances than simply that.

2. *The Court Has Authority to Consider Extra-record Information in Support of Petitioner's Motion.*

The newly-discovered statements by Leitch are properly considered in support of the Motion to Recall the Mandate. Motions made in the Courts of Appeals are frequently accompanied by supporting evidence, and the governing rules expressly authorize this practice. FRAP 27 ("If the motion is supported by briefs, affidavits or other papers, they shall be served and filed with the motion.")

Additionally, the general rule that appellate courts consider only the factual record before the district court "is subject to the right of an appellate court in a proper case to take judicial notice of new developments not considered by the lower court." United States v. Lowell, 649 F.2d 950,966 n.26 (3d Cir. 1981), quoting Landy v. Federal Deposit Insurance Corp., 486 F.2d 139, 151 (3d Cir. 1973), cert. denied, 416 U.S. 960 (1974). See also Matter of American Biomaterials Corp., 954 F.2d 919, 922 (3rd Cir. 1992) (taking judicial notice of guilty pleas entered after completion of district court proceedings). Finally, federal appellate courts have "inherent equitable authority to enlarge the record and consider material that has not been considered by the court below." Ross v. Kemp, 785 F.2d 1467 (11th Cir. 1986).

It is entirely proper for this Court to take judicial notice of the fact that Leitch gave testimony tending to exculpate Petitioner at his 1995 parole hearing. Similarly, this newly discovered evidence concerning Leitch's account of the night of the crimes may properly inform this Court's decision as to whether en banc review is appropriate in this case. Petitioner consequently submits that it would be a manifest miscarriage of justice to refuse to reconsider a judgment where there exists extra-record evidence tending to establish the veracity of testimony that the panel necessarily rejected as inherently incredible in order to deny Petitioner relief.

3. *Consideration of the Newly-Discovered Evidence, Either for the Limited Purpose of Determining Whether to Recall the Mandate, or For the Broader Purpose of Reassessing the Appeal on the Merits, Does Not Violate Procedural Rules Governing Habeas Corpus.*

That Leitch's evidence can be considered in connection with the decision whether or not to recall the mandate does not mean, however, that reliance on the new evidence is necessary to validate the determination by the late Honorable Judge Gadbois. The record of the proceedings previously reviewed by a three-judge panel of this Court should suffice to convince this en banc court that the three-judge panel erred in reversing the district court's grant of relief.

Considering the newly-discovered evidence for the limited purpose of the threshold determination of the existence of extraordinary circumstances for recalling the mandate clearly does not violate procedural rules limiting the presentation of successive habeas corpus claims. For the following reasons, considering the evidence even in connection with the rehearing of the merits of this appeal does not violate such restrictions.

That Petitioner's newly-discovered evidence could form the basis of a second or successive petition for writ of habeas corpus is not disputed. Petitioner filed claims based on that evidence in a successive state habeas petition, In re Thompson, S062592, and with his Fed.R.Civ.P. 60(b) motion in the district court. Nonetheless, the newly-discovered evidence *also* is relevant to the issues presented by the prior appeal on the merits. The panel's denial of habeas corpus relief on appeal was predicated on the alleged overwhelming nature of the evidence that Petitioner raped (then murdered) Ginger Fleischli. Petitioner's newly-discovered evidence confirms Petitioner's trial testimony, characterized by the panel as a set of "fantastic claims," that he had consensual intercourse with, and did not rape, the victim. This evidence, which was wrongfully withheld by the State and

therefore unavailable to Petitioner during the pendency of the appeal, demonstrates the falsity of the evidentiary picture painted by the panel in reversing the district court's findings regarding the weakness of the State's evidence of rape.

The panel denied Petitioner's motion to recall the mandate without prejudice to a motion to reopen the judgment below under Federal Rules of Civil Procedure, Rule 60(b) or for authorization to file a second petition under 28 U.S.C. § 2244(b)(3)(A). This disposition of Petitioner's request was based on the mistaken assumption that with his motion to recall the mandate Petitioner sought to add to his habeas petition additional grounds for relief. To the contrary, with his motion to recall the mandate, Petitioner seeks to convince this Court that it erred in reversing the district court's original grant of habeas relief. A motion to recall the mandate based on the exceptional circumstances presented by this case is the correct vehicle for reexamining this Court's prior decision.

4. *The Panel's Decision Resulted in a Fundamental Miscarriage of Justice*

A. The Panel's Finding of No Prejudice From Trial Counsel's Failures Is Based on A Misapplication of Supreme Court Precedent

In reversing the district court's finding of ineffective assistance of counsel, the panel misapplied the Strickland v. Washington, 466 U.S. 668 (1984) standard for assessing prejudice. The panel found no prejudice from counsel's failures by: (a) reviewing the evidence in the light most favorable to the judgment, akin to a "sufficiency of the evidence test," rather than the test articulated in Strickland; (b) imposing an unreasonably high burden on Petitioner, by requiring that the evidence that counsel failed to impeach "must" have affected the verdict; and (c) neglecting to consider whether or not the impact of counsel's

failings as a whole undermined confidence in the verdict. See Kyles v. Whitley, 115 S.Ct 1555, 1566 (1995)(applying analogous test of prejudice from violation of Brady v. Maryland, 373 U.S.83 (1963)). That the panel's resolution of the case was flawed is confirmed by newly discovered evidence which undermines the inferences drawn by the panel in concluding that the rape evidence against Petitioner was strong.

As the district court found, the evidence that a rape occurred was not substantial, may not have been credible, and was open to attack. Opinion and Order, ER 80, 82, 102. Petitioner demonstrated at the evidentiary hearing that the medical examiner's testimony that there were numerous injuries to the hands, arms, and legs, which occurred close to or at the time of death, was not true, ER 76-78, and the district court concluded that trial counsel's failure to rebut the forensic evidence was prejudicial. Opinion and Order, ER 80-81. The district court also found trial counsel was ineffective in failing to impeach and rebut the credibility of two jailhouse informants with readily available evidence that the informants had covered up their long careers as informants and lied about the benefits they received for informing on Petitioner and others. Order and Opinion, ER 82-101.

The panel rejected the district court's findings with regard to the forensic evidence, stating that counsel "missed opportunities to rebut only certain aspects of the forensic evidence," Thompson v. Calderon, 109 F.3d at 1368, and then determining that the remainder of the evidence of rape was sufficient to convict Petitioner. Id. at 1365-1366, 1368. Thus, the court improperly determined no prejudice only by disregarding the evidence that should have been challenged by defense counsel, and then determining that there was "enough left to convict." See Kyles, 115 S.Ct. at 1566; see id. at 1566 n. 8. In doing so, the panel utilized an "outcome-determinative" test rejected by the Supreme Court in Strickland, 466 U.S. at 693, and treated counsel's errors and omissions in isolation

rather than determining whether, had counsel adequately challenged aspects of the prosecution's case, it would have "put the whole case in such a different light as to undermine confidence in the verdict." Kyles, 115 S.Ct. at 1566.

Similarly, the panel found that there was no prejudice from counsel's failure to impeach the informants, by considering "the other evidence of rape," Thompson, 109 F.3d at 1369, and ignoring the importance of the informant testimony to the rape, rape-murder special circumstance, and capital murder.[1] In analyzing prejudice by considering what it characterized as "a strong rape case even without the informant testimony," id., the panel, as with its analysis of the forensic evidence, misapplies Strickland by determining whether "there would still have been adequate evidence to convict" even if the informant testimony were effectively impeached. See Kyles, 115 S.Ct. at 1566.

Moreover, the panel's determination that the evidence, other than that which reasonably competent counsel would have challenged, was substantial was based on a standard appropriate for determining sufficiency of the evidence, not ineffective assistance of counsel. In essence, the panel "view[ed] the evidence in the light most favorable to the prosecution." Jackson v. Virginia, 443 U.S. 307, 318-19 (1979). The panel's narrow focus failed to recognize that, had counsel competently challenged the evidence described above, the other evidence the court deemed substantial, standing alone, would have little, if any probative value.

The reasons that the panel concluded that the condition of Fleischli's body proves that Fleischli was raped, let alone that it does so overwhelmingly, remains inexplicable. When the facts

1. The prosecutor repeatedly emphasized in closing argument that the informant testimony was reliable and established Petitioner's guilt. See e.g. RT 2561, 2563, 2566, 2567, 2637-2639, 2643.

relied on by the panel are viewed in light of Leitch's observation of Petitioner and Fleischli having consensual intercourse, any probative value that they may have had to show rape, rather than consensual intercourse, is negated. See Petition to Rehear Motion to Recall Mandate; Suggestion for Rehearing En Banc, at 5, 11-13.[2]

The panel focused on Petitioner's testimony as the most damaging aspect of the case, equating it with a defendant's "clear, lucid and powerful" confession to three murders. Thompson, 109 F.3d at 1365-66, citing Williams v. Calderon, 52 F.3d 1465 (9th Cir. 1995). However, Petitioner admitted only that he had consensual sex with Fleischli, and denied that he raped or killed her. Furthermore, Leitch's observation of consensual intercourse is consistent with, and would have substantially bolstered, Petitioner's account of the events. See Petition to Rehear Motion to Recall Mandate; Suggestion for Rehearing En Banc, at 13-14.

In addition, the panel's analysis of the prejudice from counsel's inadequate impeachment of the informants is based on an improper legal standard. According to the panel, "[t]he record does not indicate that the jury must have believed Fink in order to convict Thompson of rape." Thompson v. Calderon, 109 F.3d at 1369. The panel was proceeding on the mistaken belief that Petitioner's burden in establishing prejudice was to show that the jury must have believed the informants in order to convict. The law is quite to the contrary. Although Petitioner

2. As Petitioner has shown, the cutting of the decedent's shirt and brassiere, by itself, has little probative value on the issue of rape versus consensual sex. Petition to Rehear Motion to Recall Mandate, at 11. The cut clothes have even less probative value on that issue, when viewed in conjunction with the fact that Fleischli was found with her blue jeans on. It is almost inconceivable that the perpetrator would have cut the clothing and pulled it down around her arms to restrain her for the purpose of rape, as posited by the panel, and then put her jeans back on after accomplishing forcible intercourse.

has the burden of establishing prejudice, he need only show a reasonable probability of a different result, not that counsel's deficient conduct "more likely than not altered the outcome of the case." Strickland, 466 U.S. at 693-694. Clearly, that reasonable probability is not, as suggested by the panel, a showing that counsel's conduct "must have" altered the outcome of the case, but rather only "a probability sufficient to undermine confidence in the result." Id.[3]

B. The Panel Erroneously Found That The Prosecutor's Tactics Did Not Render The Trial Fundamentally Unfair

The prosecutor obtained a conviction and death judgment against Petitioner by presenting to the jury a theory of the case which he subsequently disavowed, and which was based on inherently unreliable, perjurious and biased witnesses and on evidence which the district court found would have been undermined by reasonably competent counsel. At Petitioner's trial, the prosecutor argued that Petitioner alone had first raped Ms. Fleischli and then had killed her to cover up the rape. At Leitch's subsequent trial, the same prosecutor, before the same judge, argued that Leitch had the sole motive to commit the murder, and was equally or more culpable than Petitioner.

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3. Counsel's failures were as prejudicial on the murder as they were on the rape and rape-murder special circumstance. First, coverup of the alleged rape was the only motive the prosecutor could offer for Petitioner to murder Fleischli. Second, the jury was instructed that it could return a verdict of first degree murder based on a rape felony-murder theory. CT 1607-1611. Not only did the prosecutor urge that theory to the jury as a basis for a murder conviction, RT 2547-48, he also told the jury that rape felony-murder and the rape special circumstance were "very similar." RT 2551. Finally, the prosecutor relied heavily on both the informant testimony and the forensic evidence -- the two areas of defense counsel's inadequate performance -- in arguing that Petitioner be convicted of murder. See Appellant's Brief, filed August 14, 1995, at 38-41, 45-48.

Leitch was found guilty of second degree murder and was sentenced to fifteen years-to-life.[4]

In addition, after seeking to exclude, and then vigorously to dispute and challenge defense witnesses who testified that Petitioner's co-defendant, David Leitch, had the motive and was the perpetrator of the murder, the prosecutor then served these very same defense witnesses with subpoenas to appear as witnesses at Leitch's trial to support the prosecution's case. See Appellant's Brief, filed August 14, 1995, at 55-69.

The prosecutor's manipulation of the facts and witnesses, and his pursuit of factually and legally inconsistent theories, breached the ethical and professional duties imposed upon a prosecutor, "violated the fundamental fairness requirement stemming from the due process clause of the Fourteenth Amendment," Drake v. Kemp, 762 F.2d 1449, 1478 (11th Cir. 1985)(en banc)(Kravitch, J., concurring), and resulted in an arbitrary and unreliable death judgment in violation of the Eighth Amendment. A prosecutor "has no obligation to win at all costs and serves no higher purpose by so attempting." Bruno v. Rushen, 721 F.2d 1193, 1195 (9th Cir. 1983).

The inconsistent theories in this case are not merely "differences in emphasis," as the panel found. Thompson, 109 F.3d at 1371. Petitioner was tried and convicted of capital murder on the theory that he raped and then killed Fleischli to prevent her from reporting the rape, while Leitch's only involvement was disposing of the body. Leitch was tried on the theory that he and Petitioner jointly killed Fleischli because of Leitch's hatred of her, and that Leitch was just as likely as Petitioner to have committed rape. That is not a difference in

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4. The inconsistency between the prosecution's evidence at the two trials is revealed by the prosecutor's very different closing arguments, excerpted at length in Appellant's Brief, filed August 14, 1995, at 61-66.

emphasis -- that is a totally different factual and legal theory of what occurred.

The only reason Petitioner faces execution is because he was convicted not just of murder, but also of the special circumstance that the murder occurred during his commission of rape and that he had committed both of these crimes. If the prosecution had proceeded at Petitioner's trial on the same theory that it sponsored Leitch's trial (as well as at the preliminary hearing, at a time when Petitioner and Leitch were joined) that Leitch wanted Fleischli dead and Petitioner assisted him in killing her -- Petitioner would not have been found guilty of capital rape-murder. That theory, even though it did not totally exonerate Petitioner, would make him innocent of capital murder and would have resulted in his conviction of at most non-capital murder, as in Leitch's trial.

Conclusion

This Court should stay Petitioner's execution and recall its mandate, and determine that the panel's decision resulted in a fundamental miscarriage of justice.

Dated: July 31, 1997

Respectfully submitted,
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[Declaration of Service omitted in printing]

ORDER AND AMENDED OPINION
Filed August 3, 1997
Amended August 8, 1997
Second Amendment August 12, 1997
Third Amendment August 20, 1997

[Caption Omitted in Printing]

ORDER

The concurrence filed on August 3, 1997, is amended. The amended concurrence, attached herewith, is ordered filed.

OPINION

FLETCHER, Circuit Judge.

CHIEF JUDGE HUG, JUDGE PREGERSON, JUDGE REINHARDT concurring; JUDGE BROWNING, JUDGE TASHIMA, JUDGE THOMAS concurring in parts I, II and IV, and in the judgment.

Thomas Martin Thompson's execution is scheduled for August 5, 1997, for the rape and murder of Ginger Fleischli. We recall the mandate that issued on the March 6, 1997, amended opinion in *Thompson v. Calderon*, 109 F.3d 1358 (9th Cir.), *cert. denied*, 117 S. Ct. 2426 (1997), grant Thompson's petition for a writ of habeas corpus in part, remand in part, and direct that the order scheduling his execution for August 5, 1997, be vacated.

On March 29, 1995, the district court granted in part Thompson's first federal habeas petition. It found that Thompson's trial counsel provided constitutionally deficient representation in failing to refute the rape evidence and in failing to impeach the testimony of a notoriously unreliable jailhouse informant. The district court ordered that Thompson

receive a new trial on the rape conviction and the rape special circumstance finding and vacated his death sentence.

The panel reversed the district court's grant of habeas relief. It concluded that although trial counsel may have been ineffective, any deficient performance did not prejudice Thompson's defense to the rape and rape special circumstance charges. It affirmed the district court's denial of relief on Thompson's other claims, including his claim of prosecutorial misconduct. Due to procedural misunderstandings within our court, no en banc call was made. The United States Supreme Court denied Thompson's petition for a writ of certiorari, and on June 11, 1997, our court's mandate issued.

On July 22, 1997, Thompson filed an emergency motion with this court requesting that the panel recall its mandate and reconsider its decision.[1] The panel denied the motion. A majority of the active, nonrecused judges of this circuit then voted to reconsider en banc whether to recall the mandate. Because of the exceptional circumstances surrounding our handling of the appeal from Thompson's first habeas petition and because we are convinced that the panel committed fundamental errors of law that would result in manifest injustice, we now sua sponte recall the mandate and reverse the panel's decision. We affirm the part of the district court order granting Thompson's writ with respect to the rape conviction and rape special circumstance charge, and vacating his death sentence. We remand for further review with respect to the first-degree murder conviction, and vacate the State's order of execution.

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1. Thompson also filed a Rule 60(b) motion in the district court that was denied by the district court. He has appealed the denial to our court. We dismiss that appeal, which is now moot, in a separate order.

I. MOTION TO RECALL THE MANDATE

A.

We have the power to recall the mandate of a final decision of our court, and to do so sua sponte. *See Malik v. Brown*, 65 F.3d 148, 149 (9th Cir. 1995). We have long recognized the power to recall the mandate as a means of protecting the integrity of our processes and decisions. *Perkins v. Standard Oil Co.*, 487 F.2d 672, 674 (9th Cir. 1973). The decision whether to recall the mandate "is entirely discretionary with this court," *Feldman v. Hensman*, 815 F.2d 1318, 1322 (9th Cir. 1987), and the Supreme Court will review that decision, if at all, only for an abuse of discretion. *See Hawaii Housing Auth. v. Midkiff*, 463 U.S. 1323, 1324 (1983) (Rehnquist, J., in chambers).

Recalling a mandate is an extraordinary remedy and we will exercise our authority to do so only in exceptional circumstances, such as when it is necessary in order to prevent injustice. *Zipfel v. Halliburton Co.*, 861 F.2d 565, 567-68 (9th Cir. 1988). We have not defined or limited the exceptional circumstances that may warrant recalling the mandate. We have recalled the mandate most frequently when an intervening statutory change or Supreme Court decision has undermined the basis of our decision. *See, e.g., Malik*, 65 F.3d at 149 (statute); *United States v. Davis*, 36 F.3d 1424, 1429-30 (9th Cir. 1994) (Supreme Court decision); *Bryant v. Ford Motor Co.*, 886 F.2d 1526, 1529-30 (9th Cir. 1989) (statute); *Zipfel*, 861 F.2d at 567-68 (Supreme Court decision). Exceptional circumstances warranting recall of the mandate also exist when recall is necessary to prevent an erroneous ruling from working an injustice. *See Nevius v. Sumner*, 105 F.3d 453, 461 (9th Cir. 1996).

B.

Our interest both in protecting the integrity of our processes and in preventing injustice are implicated in the case before us. The circumstances here are exceptional for a number of reasons, individually and collectively. First, our normal en banc process did not function in the intended manner. But for procedural misunderstandings by some judges of this court, an en banc call would have been made and voted upon at the ordinary time. Second, in reversing the district court, the panel appears to have made fundamental errors of law that, if not corrected, would lead to a miscarriage of justice. The consequence of our failure to act would be the execution of a person as to whom a grave question exists whether he is innocent of the death-qualifying offense, the alleged rape, and whose conviction on the first-degree murder charge may be fundamentally flawed. This is a person who has never before been convicted of a crime. Under these circumstances, we have an obligation to recall the mandate in order to preserve the integrity of the judicial process.

We must make it clear at the outset that we act to review the panel's decision not because of any new evidence offered by Thompson nor because of any new argument or ground for relief he suggests; nor do we act because Thompson presents any second or successive claim for relief. Although, in the interests of comity, we delayed acting until Thompson's state court proceedings had concluded, we act now because we have sua sponte concluded that the interests of justice require us to afford Thompson the en banc process we should have initiated immediately after the panel's decision.

Our normal procedure when we, as a court, believe a three-judge panel has erred, is to call for a vote on whether to rehear the case en banc. No active judge requested an en banc vote when the panel's initial opinion was filed in September 1996. However, when the panel filed its amended opinion on March 6,

1997, two judges of this court advised the panel that they wished to call for an en banc vote. A series of misunderstandings led those judges to believe that the time for an en banc vote had passed, and that they were prohibited from making an en banc call at that time.[2]

Because of misunderstandings or errors by members of the court, no en banc vote was taken when it ordinarily would have occurred. Instead, the panel stayed issuance of its mandate while Thompson sought a writ of certiorari from the Supreme Court, and upon denial of his certiorari petition, the mandate issued. A sua sponte request to consider en banc whether to recall the mandate was made shortly thereafter, even before the mandate was spread in the district court. Through a consultative process, the court decided to postpone action on whether sua sponte to recall the mandate until after Thompson concluded his state court habeas proceedings and filed a further request for review in this court.[3]

> Among the most important and consistent themes in . . . death penalty jurisprudence is the need for special care and deliberation in decisions that may lead to the imposition of that sanction. The [Supreme] Court has accordingly imposed a series of unique substantive and procedural restrictions designed to ensure that capital punishment is not imposed without the serious and calm reflection that ought to precede any decision of such gravity and finality.

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2. But see G.O. § 5.4.c.(3), which provides that any judge may *sua sponte* call for an en banc vote within 21 days after the filing of a disposition *or amended disposition*. (Emphasis added).

3. As we have emphasized in the text, *supra*, our recall of the mandate is not predicated on any new evidence or claims Thompson raises in his motion to recall the mandate.

Thompson v. Oklahoma, 487 U.S. 815, 856 (1988) (O'Connor, J., concurring). We now provide for the first time en banc review of Thompson's first habeas petition -- a review which became available to him only a brief period ago. The review we now provide Thompson is available to every habeas petitioner on his first petition upon majority vote of this court. It is a part of the full and fair procedure our court affords in connection with initial habeas petitions.

We reiterate that Thompson is not responsible for the lateness of the hour. When we recognized our own procedural error with respect to this first habeas petition, we did not act immediately, but determined, in the interests of comity, to wait until the state court proceedings were concluded and Thompson sought to return to federal court. Thompson returned at the earliest possible time, and we then initiated en banc rehearing on his first habeas petition. Thus neither the Anti-Terrorism and Effective Death Penalty Act of 1996, 28 U.S.C. § 2244(a) & (b) ("AEDPA"), nor *McCleskey v. Zant*, 499 U.S. 467 (1991), is implicated here. Judge Hall's suggestion that we are opening the floodgates to frivolous last-minute petitions is clearly in error. We are acting not upon the basis of Thompson's petition, but upon the basis of our sua sponte determination to remedy our own errors. AEDPA and *McCleskey* are aimed at abusive efforts by petitioners to file second or successive petitions, not at a court's sua sponte determination that it must act to "prevent injustice [and] to protect the integrity of its process." *Bryant*, 886 F.2d at 1529.

We may not use our recall power "'simply as a device for granting late rehearing.'" *Moran v. McDaniel*, 80 F.3d 1261, 1267 (9th Cir. 1996) (quoting *Johnson v. Bechtel Assocs.*, 801 F.2d 412, 416 (D.C. Cir. 1986)). But that is not what happened here. The failure to call for en banc at the regular time in a capital case involving serious constitutional issues is in itself exceptional in our court. In fact, it is unprecedented. Indeed, there has been no occasion in the past several decades in which

this court has made a similar error in any type of case. Yet *our* mistake should not prevent a capital habeas petitioner from receiving full and fair consideration of his claims by an en banc court, particularly in a case in which it appears that the panel decision may result in a miscarriage of justice.

The district court granted Thompson partial habeas relief on the ground that his counsel was unconstitutionally ineffective and that the ineffective assistance prejudiced the outcome of Thompson's trial. The panel reversed. An erroneous reversal alone may not be exceptional. But here, Thompson's trial counsel's ineffectiveness, as found by the district court, directly affects the issue of Thompson's possible innocence of the rape, and raises the question whether, but for the ineffectiveness, the jury would have acquitted Thompson of the rape charge and special circumstance upon which his death sentence is predicated.

The district court, after an extensive evidentiary hearing, considered Thompson's habeas petition for a prolonged period before rendering a decision granting partial relief. Its thorough and well-reasoned opinion discussed in detail trial counsel's failure to present an effective defense against the State's charge that Thompson raped Fleischli, or even to question whether a rape occurred. The district court found that trial counsel provided an ineffective defense to the State's forensic evidence of rape and that counsel's deficient performance in that respect prejudiced the verdict. *See Strickland v. Washington*, 466 U.S. 668, 693-94 (1984). The district court also determined that Thompson's counsel was ineffective in failing to investigate the backgrounds of two jailhouse informants who testified that Thompson confessed to the rape, and in failing to present readily available evidence undermining the informants' testimony. The district court concluded that "the evidence of rape was not substantial" and that the failure to impeach at least one informant also prejudiced the verdict.

The panel reversed, relying primarily on the prejudice prong of the *Strickland* test. It concluded that counsel's assumed incompetence in failing to rebut the State's forensic evidence and to investigate and impeach witnesses whose history gravely undermines the reliability of their testimony did not affect the outcome of Thompson's trial. It reached this conclusion although the district court had explained carefully and persuasively, on the basis of its credibility determinations and assessment of the physical evidence, why the result probably would have been different with respect to the rape charge and the rape special circumstance finding. Moreover, both areas of ineffectiveness relate to the alleged rape, and Thompson's death sentence rests exclusively upon the existence of the rape conviction and the rape circumstance. At the very least, questions of the most serious nature exist as to the panel's reversal of the district court's finding that counsel's ineffectiveness raised a reasonable probability that the jury convicted Thompson of a rape he did not commit and then erroneously sentenced him to die for a capital offense.

In addition, a serious question exists as to whether Thompson was deprived of due process of law by the prosecutor's presentation of flagrantly inconsistent theories, facts, and arguments to the two juries that separately heard Thompson's case and that of his co-defendant, David Leitch. While the district court concluded that no constitutional violation occurred, our review of the record persuades us that the prosecutor's tactics may well have resulted in Thompson's receiving a fundamentally unfair trial. These tactics, including the use of the two highly dubious jailhouse informants, appear to compound the constitutional violations that flow from defense counsel's ineffective performance.

When we examine the totality of the circumstances (both substantive and procedural), the grave questions that exist regarding Thompson's innocence of any capital offense, the likelihood that the panel's decision is erroneous, and the

consequences that would flow from allowing an erroneous decision to go unreviewed, we are persuaded that the circumstances involved are extraordinary.

C.

Before we may recall the mandate, we confront a chicken and egg dilemma. In most cases, to justify recalling the mandate, we must conclude that there is substantial doubt as to whether the panel erred and that recall is necessary to prevent manifest injustice. By the same token, we cannot reexamine the panel's decision and rule on the merits without having recalled the mandate. This process is not unlike determinations in respect to standing; the court must peek under the corner of the rug at the merits to determine what is at stake before knowing whether the parties have standing enabling the court to exercise its jurisdiction to determine the merits. Our inquiry here thus has a two-fold objective: First, we must determine whether the panel may have been wrong, and whether if we fail to act we may be perpetrating a manifest injustice; if so, we must recall the mandate. Second, once we do, we must determine on the merits whether habeas relief should be granted.

We recognize, as Judge Hall's dissent notes, that our court recently has rejected a petitioner's motion to recall the mandate which was clearly an effort to circumvent the procedural bars embodied in the AEDPA. *See Nevius*, 105 F.3d at 46162. But the dissent overlooks that in *Nevius*, we explicitly stated that "Nevius wants us to recall our mandate . . . *not to nullify an erroneous decision*, but to reopen the proceeding so that he may present new claims that now cannot be addressed in a subsequent petition." *Id.* at 461 (emphasis added). This statement recognizes the principles embodied in the cases we cite here; i.e., that the mandate may be recalled to correct an erroneous decision which would result in a manifest injustice.

Moreover, our rejection of the motion to recall the mandate in *Nevius*, and in other death penalty appeals, *see, e.g., Greenawalt v. Stewart*, 105 F.3d 1268, 1278 (9th Cir. 1997), merely substantiates that here, exceptional circumstances caused a majority of the active judges of this court to vote in favor of allowing an en banc court to determine whether to recall the mandate.

Our initial examination of this case leaves us with "a firm belief that this is the exceptional case requiring recall of the mandate in order to prevent an injustice." *Verrilli v. City of Concord*, 557 F.2d 664, 665 (9th Cir. 1977). We believe just as strongly that it is necessary to do so in order to protect the integrity of our process. For all of the reasons we have heretofore discussed, we order the mandate recalled.

Only an en banc panel court may overrule an earlier decision by a panel of this court. *See* Fed. R. App. P. 35(a)(1); Ninth Cir. R. 35-1. A majority of the active judges of this circuit has voted to rehear en banc the panel's refusal to recall the mandate, and this en banc court has now determined that it shall be recalled. Implicit in our power to do so is our authority to reconsider the merits of the case as an en banc court. *See Songer v. Wainwright*, 769 F.2d 1497 (11th Cir. 1985) (after panel denied motion to recall the mandate, a majority of the court voted to recall the mandate and reconsider the appeal en banc); *Uzzell v. Friday*, 625 F.2d 1117, 1122 (4th Cir. 1980) (Widener, J., dissenting) (court on its own motion recalled the mandate of the panel decision and ordered rehearing en banc on the merits). Thompson's appeal from the district court's decision, and the State's cross-appeal, are now properly before this en banc court, and we turn to the merits of those appeals.

II. INEFFECTIVE ASSISTANCE OF COUNSEL

We now review de novo the district court's partial grant of Thompson's habeas petition. *Sanders v. Ratelle*, 21 F.3d 1446,

1451 (9th Cir. 1994). We must consider the district judge's determinations on both the performance and prejudice prongs of the ineffective assistance of counsel test. *See Strickland*, 466 U.S. at 698. Although Thompson must rebut the "strong presumption" that his trial counsel provided adequate assistance and exercised reasonable professional judgment in representing him, *id.* at 690, the district court's factual findings are entitled to the usual deference. *Hendricks v. Calderon*, 70 F.3d 1032, 1036 (9th Cir. 1995) (noting that although an ineffectiveness claim presents a mixed question of law and fact, reviewed de novo, the district court's factual findings should be accepted unless clearly erroneous). We find ineffective assistance only when counsel's performance falls below a reasonable standard of professional representation and when counsel's deficient representation undermines our confidence in the outcome of the trial. *Strickland*, 466 U.S. at 694; *Clabourne v. Lewis*, 64 F.3d 1373, 1378 (9th Cir. 1995).

A. Failure to rebut forensic evidence of rape

To support the rape case against Thompson, the State called the coroner, Dr. Richards, to testify. Richards testified that in his autopsy of Fleischli he found bruises on her ankles, palms, wrists, right elbow, and right knee, as well as a "crushing injury" to her right wrist. Richards testified that except for the right knee, the injuries had all occurred at or near the time of death and were the result of heavy handling. Richards also testified that he found no vaginal tearing or bruising, but that such tearing or bruising is not necessary to indicate rape.

Thompson's trial counsel, Ronald Brower, cross-examined Richards only on the question of whether there was vaginal tearing. He did not cross-examine Richards at all regarding the bruises, although on redirect examination Richards stated that evidence of bruising to the body could indicate rape. Richards also testified that he found no "anatomical" evidence of rape, but that sperm and semen analysis might provide such evidence.

Brower did not cross-examine Richards to clarify these statements.

At the evidentiary hearing before the district court, Thompson presented the testimony of Dr. Root, an independent pathology expert in whom Brower had consulted, but had not called as a witness. Root testified that he had reviewed the autopsy report and that, if called, he would have testified that the bruises described in the report were several weeks old, with the exception of the wrist injury. Root opined that the bruises on Fleischli's hands were the result of livormortis, not injury, and that the time of the right wrist injury could not be estimated accurately because of the lack of cellular response.

Root further testified that the coroner's report showed that there was no semen drainage in the crotch of Fleischli's tight jeans, which were zipped and belted and which she wore without underpants. Fleischli's vaginal swab revealed recent semen with "infrequent" sperm. Both the lack of drainage and the infrequent sperm suggested that Fleischli had douched or washed after sex, consistent with consensual sex but not with rape followed by murder.

Brower testified at the evidentiary hearing that he had not pursued further consultations with Root because he feared that if he decided not to use Root as a witness, the prosecutor would find out and use that fact against him. The district court soundly rejected this specious argument, reminding Brower that the prosecutor could not have introduced evidence that Brower had consulted with but not called an independent pathologist. Brower also testified that he cross-examined Richards only on the vaginal tearing issue, and not on the bruising, because Richards earlier had informed Brower that there was "no anatomical evidence" of rape, and Brower wanted to make sure Richards testified consistently with that opinion.

Brower admitted that he knew the prosecution would argue that the bruising evidenced rape, but he testified that he planned to argue to the jury that David Leitch, not Thompson, inflicted those bruises. Brower testified that he did not think it was "necessary" to rebut Richards' evidence about the bruises. Finally, Brower testified that he did not recall learning of the lack of drainage in Fleischli's jeans or of the significance of that evidence. Brower somehow found it unnecessary to pursue readily available evidence that would have undermined the State's rape case because his theory was that Leitch raped Fleischli, not that no rape occurred.

The district court found, and the panel assumed, that Brower's failure to investigate, develop, and present evidence rebutting the State's forensic evidence of rape fell below a reasonable standard of professional representation. As we have noted, the district court found that defense counsel "had no valid tactical reason for not attacking the rape evidence." Like the district court, we cannot find that Brower's purported choice was professionally reasonable.

Brower's theory that Leitch raped Fleischli was inconsistent with his reliance on the coroner's statement that there was "no anatomical evidence of rape." Brower irrationally devoted much of his defense to this theory, rather than advancing the theory that no rape had taken place. The existence of a rape conviction exposed Thompson to the death penalty on two possible grounds: felony murder and murder with rape as a special circumstance. By not rebutting the prosecution's rape evidence, Brower unnecessarily risked Thompson's life, ostensibly in order to pursue an alternative theory of the case.[4] We agree with the district court that Brower's performance in this respect was constitutionally deficient.

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4. The district court found Brower's explanations not credible and criticized both his performance at trial and his deposition testimony at the habeas hearing.

We also conclude, as did the district court, that Brower's failure to attack the rape evidence was prejudicial. Richards' testimony provided the State's strongest evidence on the rape charge. As the district court found, if Brower had "negated the rape, he would have cast considerable doubt on Thompson's role in the murder. . . . Without the rape theory, Thompson had no obvious motive to kill Fleischli." Had Brower impeached the coroner's testimony, the State would have been left mainly with evidence that Fleischli's vaginal swab contained semen consistent with Thompson's blood type and Thompson's testimony that he had consensual sex with Fleischli on the night of her death.[5] This evidence could not have sustained a rape conviction.[6] Thus, absent Brower's ineffectiveness, the outcome of Thompson's trial would in all probability have been different -- he most likely would not have been convicted of the rape or the rape special circumstance, and therefore could not have been sentenced to die. Had Brower adequately challenged the State's rape charge, he would have "put the whole case in such a different light as to undermine confidence in the verdict." *Kyles v. Whitley*, 115 S. Ct. 1555, 1566 (1995). We can think of no error more prejudicial than one that is the precipitating cause of an erroneous death sentence.

B. Failure to impeach Fink

At Thompson's trial, the State called Edward Fink, a jailhouse informant, who testified that Thompson had admitted raping and murdering Fleischli. Fink testified that he had come

5. The State also called two jailhouse informants, who testified that Thompson had admitted to raping Fleischli. As we discuss *infra*, Brower also was ineffective for failing to impeach these informants, whose testimony was patently unreliable.

6. There also was evidence that Fleischli's blouse and bra had been cut up the middle and pulled down to her elbows. Viewed with the evidence that Fleischli's jeans were on, zipped, and belted, this more likely suggests that the restraint was connected to the murder than that it evidenced a rape.

forward with Thompson's confession on his own initiative and that in exchange for his statement he asked only that he be allowed to serve his parole violation sentence in Chino. Fink also admitted to four prior felony convictions.

Brower cross-examined Fink and elicited that Fink had spoken twice with law enforcement officers about Thompson's case. Brower also produced Fink's rap sheet, which listed his additional felonies and numerous aliases. Brower also inquired into Fink's history of drug abuse, and got Fink to admit that he was known as an informant.

There was, however, far more to the story of perennial informant Fink. At the evidentiary hearing, Thompson produced Fink's extensive history as an informant who frequently claimed that fellow inmates confessed their crimes to him while awaiting trial and who frequently received favors in exchange for cooperating with the police. Joel Baruch, a defense attorney, testified that in another capital case, in which he represented the defendant, he had discovered Fink's informant history, including statements in Fink's file by law enforcement officers that Fink was an unreliable informant, a con man, and a heroin addict. Baruch testified that after he repeatedly advised the prosecutor in his case that he was well aware of Fink's background, the case was dismissed. Thompson also offered a transcript of Fink's testimony in *People v. Goldstein*, a 1980 California murder trial. Goldstein's counsel cross-examined Fink at length, and he undermined Fink's credibility by showing that Fink regularly informed to law enforcement officers in exchange for future favors and probably had fabricated Goldstein's confession.

Brower testified at the evidentiary hearing that he had stopped investigating Fink's background before trial because he believed he had enough material to cross-examine Fink, and that he had stopped cross-examining him because he thought the judge was getting restless and the jury had "gotten the message."

Like Brower's excuse for not calling an independent forensic expert, this feeble explanation underscores Brower's ineffectiveness. Brower readily could have obtained evidence about Fink's background as an informant and the favors he received in exchange for his frequent testimony. Of particular relevance to Thompson's case was the fact that Fink was released from his parole hold soon after he provided the information that incriminated Thompson. Rather than investigating Fink's background or requesting discovery from the prosecutor regarding Fink, Brower focused on Fink's drug use and on whether Fink in fact had been in sufficient proximity to Thompson to obtain the alleged confession. Given the crucial import of Fink's testimony, Brower's conduct in failing adequately to impeach him fell well below a reasonable standard of professional representation.

Brower's failure to investigate and impeach Fink severely prejudiced Thompson. Brower could have destroyed Fink's credibility. Without Fink's testimony, the State's rape case against Thompson would have been dramatically weaker. We are in accord with the district court; Brower's ineffective assistance in defending against the forensic evidence and against Fink's testimony fatally undermines our confidence in the outcome of Thompson's rape conviction. *See Kyles*, 115 S. Ct. at 1566. Without the rape finding, Thompson could not have been sentenced to death. Brower's ineffective performance therefore prejudiced not only the rape conviction and the rape special circumstance, but the ultimate outcome: the finding of death eligibility and the imposition of a capital sentence.

C. Failure to impeach Del Frate

A second informant, John Del Frate, also testified at Thompson's trial. The district court concluded that Brower readily could have discovered and presented substantially more impeaching evidence against Del Frate. In particular, Brower failed to show that Del Frate's testimony that Thompson said he

stabbed Fleischli in the torso and buried her in a "shallow grave" was both false as to what happened to Fleischli and, even more important, parroted almost verbatim inaccurate news reports. Brower also failed to discover that Del Frate had served as an informant since the age of fourteen, that two police agencies for whom Del Frate informed considered him unreliable, that Del Frate's family considered him to be a pathological liar, and that Del Frate had shared a cell with Leitch for several weeks before coming into contact with Thompson. The panel's conclusion that "Brower could hardly have impeached Del Frate more than he did" is patently wrong.

Brower's failure to investigate and impeach Del Frate, whose testimony he admitted was important to the prosecution's case, was unconstitutionally deficient. It also was prejudicial. As the prosecutor himself stated in his closing argument, Fink and Del Frate's testimony provided the dispositive evidence that Thompson had raped Fleischli and murdered her to cover up the rape. Had Brower impeached Del Frate, as well as Fink, the prosecution's rape case against Thompson would have been substantially weakened. Brower's cumulative errors in failing to investigate and impeach the jailhouse informants and to rebut the forensic evidence of rape cast grave doubt on the reliability of the rape conviction and the rape special circumstance finding, and thus of the death sentence itself.

For all of the reasons we have previously discussed, we grant Thompson's writ of habeas corpus with respect to the rape count, the rape special circumstance allegation, and the capital sentence.

III. PROSECUTORIAL MISCONDUCT

There is an alternate ground that also requires the relief we order. In his habeas petition before the district court, Thompson claimed that the prosecutor's use of fundamentally inconsistent theories at his and Leitch's trials violated due

process. The district court rejected this argument, and the panel affirmed that conclusion. Having carefully reviewed the record, and having given due deference to the district court's analysis, we conclude that we must reverse on this ground as well.

A. The pretrial phase

At the preliminary hearing, when Thompson and Leitch were still joined as co-defendants, Deputy District Attorney Daniel Brice asserted that Leitch wanted Fleischli dead, and that he enlisted Thompson to join in the killing. In support of this theory, the prosecution presented the testimony of four jailhouse "informants" who claimed to have obtained confessions from Thompson: David Vogel, David Wright, Timothy Gravelle, and Robert Evans. Each informant told essentially the same story: Leitch wanted Fleischli dead for interfering with his attempts to reconcile his relationship with his ex-wife, Tracy Leitch, and, therefore, had recruited Thompson to help him kill her. According to Vogel's testimony, Thompson had told him that on the night of the murder, he engaged in consensual sex with Fleischli.[7] Then, when Leitch returned home, the two executed Leitch's "plan," and killed Fleischli. The State charged both men with capital murder based on rape and murder of Fleischli.

At the close of the preliminary hearing, the magistrate found that there was insufficient evidence to hold Thompson and Leitch on the rape charge and the rape special circumstance allegation. Nonetheless, the State filed an information charging Thompson and Leitch, *inter alia*, with murder, rape, and rape as a special circumstance.

After the information was filed, Deputy District Attorney Michael Jacobs replaced Brice as lead counsel for the prosecution. Jacobs then reviewed all of the tapes, police

7. Vogel testified, for example, that Thompson had told him that Fleischli had been "a little tipsy," but that "[h]e didn't rape her."

reports, forensic reports, and court transcripts in the case. Those records, among other things, described Leitch's violent history, Leitch'S past threats toward Fleischli, Leitch's desire to reconcile with his ex-wife[8] and his perception that Fleischli was an impediment to that goal, physical evidence that tied Leitch to the crime, and Leitch's inconsistent statements to police following the crime.

Upon reviewing the evidence, Jacobs concluded that he would continue to pursue murder-with-special-circumstance convictions against both defendants, on the theory that Leitch had the motive for killing Fleischli, and that both men were equally culpable for raping and murdering her. On his own admission, Jacobs never altered his view of the motive and the crime, either before or after he won Thompson's conviction.

Some months later, Thompson and Leitch moved under California Penal Code § 995 to set aside the rape charge and the rape special circumstance allegation as unsupported by probable cause. At the hearing, at which the record shows Jacobs to have been present, one of his assistants represented to the court that "[Leitch] is the only person throughout the record who has a motive . . . . According to [Tracy Leitch,] David Leitch was negotiating a reconciliation with Tracy Leitch and Ginger Fleischli was not reacting very cooperatively to that circumstance, and there is the motive -- she was in the way." The trial court denied the defendants' motion without comment.

Leitch then moved successfully to sever his trial from Thompson's. The prosecutor elected to try Thompson first.[9]

8. According to the prosecution, Leitch's desire to reconcile with his ex-wife was motivated by the fact that she had recently come into a substantial sum of money as the result of a personal injury settlement.

9. Henceforth, when we refer to "the prosecutor," we mean Jacobs.

B. The trials of Thompson and Leitch

The prosecutor's pursuit of fundamentally inconsistent theories is evident from the transcripts of the two trials. In the second trial, the prosecutor presented essentially the same theory used at the pretrial proceedings. Yet, in between those court proceedings, the prosecutor convicted Thompson under an entirely different theory, and argued critical facts to Thompson's jury that were at odds with those presented both in the preliminary hearing and in Leitch's trial.

The prosecutor presented markedly different and conflicting evidence at the two trials. At Thompson's trial, the prosecutor did not call any of the four jailhouse informants who had testified at the preliminary hearing and claimed that Thompson had confessed to them. Instead, he called two new jailhouse informants, Fink and Del Frate, who also claimed that they were the recipients of Thompson's confession, but who told an entirely different and factually inconsistent story. Contrary to the testimony of the earlier informants, the two new informants testified that Thompson had told them that he had raped Fleischli and had killed her before Leitch returned home, and that he killed her in order to prevent her from reporting the rape.[10] Fink further testified on direct examination that Leitch found out about the murder only when he returned home, and that he merely assisted Thompson in disposing of the body because Thompson convinced him that they should go to Mexico together. The testimony of Fink and Del Frate provided the only direct evidence that (1) Thompson killed Fleischli, (2) Fleischli was raped, and (3) Thompson raped her. The prosecutor termed the two informants' testimony "dispositive" and "very, very damaging" because they had "no reason whatsoever [to] lie." The latter statement is patently untrue, as

10. In fact, Fink had made his testimony available to the State before the joint preliminary hearing. The state elected not to call him at that stage, but rather chose to rely on other informants who told very different stories.

demonstrated by the fact that shortly after Fink incriminated Thompson, his parole hold was dropped and he was released from jail on the basis of favorable information provided by law enforcement officials.

The prosecutor did not call either Fink or Del Frate at Leitch's trial. Instead, he called *defense* witnesses from Thompson's trial (most of whom he had subpoenaed for Leitch's trial immediately after objecting to their testimony at Thompson's trial). These witnesses testified about Leitch's violent disposition, Leitch's threats toward Fleischli, and Leitch's motive to kill Fleischli. The prosecutor relied heavily on their testimony to establish Leitch's motive for the murder.

C. Closing arguments

The glaring inconsistency between the prosecutor's theories, arguments, and factual representations at the two trials is apparent when one juxtaposes his closing arguments.

At Leitch's trial, the prosecutor argued that:

> [Leitch is] the only one, before the victim's death, who expressed any hatred for her and *the only one with any motive* for her death.
>
> . . . .
>
> [Leitch's desire to reunite with his ex-wife is] really *the only motive* we have in this case, and people have killed for less.
>
> . . . .
>
> [Leitch's] was the *only motive* or reason for her demise.

(Emphasis added).

Yet at Thompson's trial, the prosecutor advanced a contrary motive for Fleischli's death. He asserted that the sole motive was Thompson's desire to cover-up the alleged rape:

> Why did Ginger Fleischli die? Because she said she was going to tell for what he [Thompson] did to her. So he killed her.
>
> What did both Mr. Fink and Del Frate say? What do both of their statements have in common? [Thompson] didn't want any witnesses.
>
> . . . .
>
> The defendant said he raped the victim and killed her *to prevent being caught for rape*.

(Emphasis added).

At Leitch's trial, the prosecutor adhered to the State's original theory that Leitch was an active participant in the murder:

> And I want to make it very clear that the State has charged Mr. Leitch with first degree murder, and with special circumstances. And as far as we are concerned, he's guilty of that or he's guilty of nothing.
>
> . . . .
>
> *The problem is, all of the evidence we have incriminates Mr. Leitch, at best, equally, and more so than Mr. Thompson.*
>
> *. . . Both men were together inside that apartment with Ginger Fleischli.*

> . . . .
>
> So we have to ask ourselves, why would Mr. Thompson murder Miss Fleischli alone in an apartment where he lived, with no transportation, no means to move the body and wait for Mr. Leitch to come home to be an A-1 witness for the murder of his ex-girlfriend? Is that reasonable or logical? Do you think that's what happened?
>
> . . . .
>
> You think Mr. Thompson did this all by himself and waiting for this good guy to come home so he could see him standing over his ex-girlfriend, who he lived with ten days before? No, it didn't happen that way.

(Emphasis added).

The prosecutor, however, asserted as the truth before Thompson's jury the story he subsequently labeled absurd and incredible in Leitch's trial:

> . . . [Thompson] was the *only person* in that apartment with Miss Fleischli the night at the time she was killed.
>
> . . . .
>
> We have the evidence that establishes Mr. Thompson *alone* in an apartment with a girl who is raped and murdered.
>
> . . . .
>
> The David Leitch involvement -- we have all this stuff on the board about him saying bad things about

his girlfriend. What evidence do we really have that he did anything, had any part except that his car was used to move the body and that his shoe print was at the scene? *There is no evidence we have putting him in the apartment that night.*

(Emphasis added).

D. Post-trial theory

Not surprisingly, the prosecution's original theory continued to prevail after the trials were concluded. The prosecutor submitted the following statement for use in Leitch's future parole proceedings: "Fleischli was bound and gagged . . . by [Leitch and Thompson] . . . and was then stabbed . . . by one or both of the defendants." He made no mention of any rape.

E. Due process analysis

We are left with a picture of the prosecutor's temporary abandonment during Thompson's trial of the theory he presented, and supported with evidence, at the preliminary hearing, in the pretrial motions, and again at and after Leitch's trial. The prosecutor manipulated evidence and witnesses, argued inconsistent motives, and at Leitch's trial essentially ridiculed the theory he had used to obtain a conviction and death sentence at Thompson's trial. The question before us is whether this prosecutorial misconduct violated Thompson's right to due process and a fair trial.

The Supreme Court has long emphasized our Constitution's "overriding concern with the justice of finding guilt." *United States v. Agurs*, 427 U.S. 97, 112 (1976). In particular, the Due Process Clause guarantees for every defendant the right to a trial that comports with basic tenets of fundamental fairness. *Lassiter v. Department of Soc. Servs.*, 452 U.S. 18, 24-25 (1981);

see also Turner v. Louisiana, 379 U.S. 466, 471-72 (1965); *In re Murchison*, 349 U.S. 133, 136 (1955).

The prosecutor, as the agent of the people and the State, has the unique duty to ensure fundamentally fair trials by seeking not only to convict, but also to vindicate the truth and to administer justice. The Supreme Court recognized, over sixty years ago, that

> [b]ecause the prosecutor is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer . . . , [i]t is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate method to bring about one.

Berger v. United States, 295 U.S. 78, 88 (1935), *overruled on other grounds by Stirone v. United States*, 361 U.S. 212 (1960).

This court has reaffirmed that this duty of furthering just convictions "is [the prosecutor's] highest purpose." *Bruno v. Rushen*, 721 F.2d 1193, 1195 (9th Cir. 1983). In *United States v. Kojayan*, 8 F.3d 1315, 1323 (9th Cir. 1993), we further stated: "While lawyers representing private parties may -- indeed, must -- do everything ethically permissible to advance their clients' interests, lawyers representing the government in criminal cases serve truth and justice first. The prosecutor's job isn't just to win, but to win fairly, staying well within the rules." *See also United States v. Kattar*, 840 F.2d 118, 127 (l st Cir. 1988) (stating that the function of the prosecutor "is not merely to prosecute crimes, but also to make certain that the truth is honored to the fullest extent possible"); *Bruno*, 721 F.2d at 1195."[11] This is so

11. The American Bar Association also recognizes the special place of prosecutors in our constitutional system. "The responsibility of a public prosecutor differs from that of the usual advocate; his duty is to seek justice,

because "[s]ociety wins not only when the guilty are convicted but when criminal trials are fair; our system of justice suffers when any accused is treated unfairly." *Brady v. Maryland*, 373 U.S. 83, 87 (1963).

The prosecutor may not "[become] the architect of a proceeding that does not comport with the standards of justice." *Id*. The prosecutor, therefore, violates the Due Process Clause if he knowingly presents false testimony -- whether it goes to the merits of the case or solely to a witness's credibility. *Naupe v. Illinois*, 360 U.S. 264 (1959); *Mooney v. Holohan*, 294 U.S. 103 (1935).[12] Moreover, the prosecutor has a constitutional duty to correct evidence he knows is false, even if he did not intentionally submit it. *Giles v. Maryland*, 386 U.S. 66 (1967).

From these bedrock principles, it is well established that when no new significant evidence comes to light a prosecutor cannot, in order to convict two defendants at separate trials, offer inconsistent theories and facts regarding the same crime. Then-judge Kennedy wrote for our court that when there are claims of inconsistent prosecutorial conduct, reversal is not required where the underlying theory "remains consistent." *Haynes v. Cupp*, 827 F. 2d 435, 439 (9th Cir. 1987). Here, little

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not merely to convict." ABA Model Code of Prof. Responsibility EC 7-13 (1981); *see also* ABA Standards for Criminal Justice § 3-5.8(c)(d) (2d ed. 1981) (prosecutor has responsibility to guard fights of accused and those of society).

12. Given that a prosecutor may not "knowingly" introduce false testimony, we disagree with the district court's decision to read, but to declare "irrelevant," the prosecutor's deposition testimony taken for this federal habeas proceeding. We think that the prosecutor's knowledge and beliefs, before and after Thompson's trial, regarding this crime are entirely probative of whether the prosecutor presented at the trial a theory and set of facts that he knew contradicted the theory and facts that he planned to advance, and eventually advanced, at Leitch's trial.

about the trials remained consistent other than the prosecutor's desire to win at any cost.

Drake v. Kemp, 762 F.2d 1449 (11th Cir. 1985) (en banc), bears remarkable similarities to our case. There, the State charged two men with murder and armed robbery. The State prosecuted the first defendant, Campbell, on the theory that Campbell alone committed the murder. But in the second defendant's trial, the State asserted that Campbell, due to illness, was physically incapable of killing the decedent. Rather, the State argued, the second man, Drake, must have "actually beat the victim," and, in support of this theory, the State presented Campbell as its star witness. *Id*. at 1472 (Clark, J., concurring). On direct examination, Campbell recited the same testimony that the State had refuted at Campbell's trial. Drake was convicted of murder and robbery.

The court granted habeas relief on other grounds, but Judge Clark wrote separately to emphasize that the prosecutor's actions of advancing inconsistent theories constituted a "fundamental and egregious error" that violated the Due Process Clause. *Id*. at 1470 (Clark, J. concurring). Judge Clark reasoned:

> [T]he prosecution's theories of the same crime in the two different trials negate one another. They are totally inconsistent. This flip flopping of theories of the offense was inherently unfair. Under the peculiar facts of this case the actions by the prosecutor violate the fundamental fairness essential to the very concept of justice. *Lisenba v. California*, 314 U.S. 219 (1941). However, it makes no sense to say that only Campbell's due process rights were violated by the inconsistent theories. . . . This is especially true in this case because the fingerprints, blood tests, and a witness linked Campbell and not Drake to the crime. That

> evidence is highlighted by Campbell's subsequent recantation.
>
> The state cannot divide and conquer in this manner. Such actions reduce criminal trials to mere gamesmanship and rob them of their supposed search for truth. In prosecuting Campbell and Drake for the murder of Mr. Eberhart, the prosecutor changed his theory of what happened to suit the state. This distortion rendered Henry Drake's trial fundamentally unfair.

Id. at 1479 (Clark, J., concurring).

We believe that Judge Clark's concurrence expresses well the principles that govern the case before us. We disagree with the panel's statement that if any party suffered from the prosecutor's conduct, it was Leitch, not Thompson. To the contrary, Thompson was prejudiced. From the beginning, the prosecutor's theory was that the murder resulted from Leitch's plot to eliminate his former girlfriend, who impeded his reunion with his ex-wife and her money, and that both Leitch and Thompson were involved in the actual killing. Only in Thompson's trial did the prosecutor change the theory and the arguments, and offer facts that directly conflicted with the underlying premise of the charges he brought. Only in Thompson 's trial did the prosecutor assert that Thompson was alone in the apartment and killed Fleischli to cover up a rape. Only in Thompson's trial did the prosecutor use as witnesses Fink and Del Frate, who were known to law enforcement officers to be wholly unreliable. In Leitch's trial, the prosecutor returned to his original theory and discredited the very evidence he had previously offered in Thompson's trial. Thus, Thompson, rather than Leitch, suffered from the due process deprivation that infected the conflicting prosecutions.

IV. MURDER CONVICTION

Finally, consideration must be given to the effect of our vacatur of the rape conviction on the first-degree murder conviction. Thompson contends, with some force, that the conviction cannot stand because, inter alia, the jury was instructed under the felony murder doctrine. However, the district judge did not address that issue, nor did he discuss the murder conviction in his opinion, except to say, "as to the murder charge, . . . the writ of habeas corpus is denied." Accordingly, we remand the question of the murder conviction to the district court for its initial consideration in light of our vacatur of the rape conviction.

CONCLUSION

Having recalled the mandate, we vacate the panel's decision and affirm the district court with respect to the rape conviction, the rape special circumstance, and the death penalty. We remand the first degree murder conviction to the district court for further consideration in light of this action. We grant Thompson's writ of habeas corpus in part and order that the State vacate its order of execution. The district court shall enter the partial writ unless the State elects to retry Thompson within a reasonable time. The vacatur of the execution order shall be effective immediately. The mandate shall issue forthwith.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED; EXECUTION ORDER VACATED.

REINHARDT, Circuit Judge:

I.

I concur wholeheartedly in Judge Fletcher's opinion for the court. Regretfully, however, I cannot let Judge Kozinski's extraordinary dissent pass unchallenged. Because we cannot delay filing any longer, I am able to comment on that unfortunate document only very briefly.

Perhaps to those who read his recent musings in The New Yorker magazine regarding his personal experiences in voting in death penalty cases,[1] Judge Kozinski's rambling analysis will come as no surprise. Others surely will be astounded by some of the conclusions he reaches and some of the factual errors he makes. I have time to note only one of each:

First, Judge Kozinski's conclusion that the en banc process is not available when the objective is to correct specific constitutional errors that will result in the execution of a person who cannot lawfully be executed misses the point not only of our en banc process but of our justice system as a whole. Of course our en banc process is available to correct such grievous and otherwise irremediable errors. Judge Kozinski writes:

> If the en banc call is missed for whatever reason, the error can be corrected in a future case where the problem again manifests itself. Since any problem worthy of en banc consideration will perforce appear again and again, missing an en banc call in a single case does not terminate forever the opportunity of judges troubled by the error to raise the issue. . . .

1. Alex Kozinski, *Tinkering With Death: A Death-Penalty Judge Reflects: How Does It Feel To Send Another Man To Die?*, New Yorker, Feb. 10, 1997, at 48.

> That this is a capital case does not change this calculus.

This conclusion is bizarre and horrifying in its implications, and is unworthy of any jurist. We cannot correct the error of an unconstitutional execution in the next case. Surely no responsible judge could believe otherwise.

Second, contrary to what Judge Kozinski represents in his dissent, the entire court was immediately notified of the three-judge panel's unprecedented refusal to permit two judges of this court a brief extension of time in which to make an en banc call. In addition, before our mandate was spread in the district court, two other judges also requested that a belated en banc call be entertained. Again, the entire court was notified immediately.

This is a court which has been marked by collegiality and fairness. We work well together and are all, without exception, proud of this institution. We will all continue in that vein when this case is over. Nevertheless, it is essential to observe that the refusal to permit a late en banc call was contrary to our custom and practice and was indeed aberrational and extraordinary, as is Judge Kozinski's dissent.

One might think that some of us had forgotten that we are construing a Constitution, examining the question whether a fair trial was held, considering whether a strong possibility of actual innocence exists, and determining whether under our system of law a man should live or die. Reading Judge Kozinski's strange dissent, one would think that justice is irrelevant in this nation and that all that matters in our system of law is whether a single piece of paper was misplaced in a judge's chambers, or whether some recondite internal General Order was complied with to the last detail. That is surely not the type of legal system in which most of us believe. That is surely not the type of nation that we represent ourselves to be when we offer ourselves as a model of

fairness and decency, democracy and civilization, throughout the world.

II.

Judge Kozinski has chosen to add to his previously filed dissent. Accordingly, I take this opportunity to add to the brief concurrence (now section I, *supra*) I was required to draft in only a few short hours. The picture Judge Kozinski paints of our court is not a fair one and does a disservice to the institution. By selective quotations from portions of internal memoranda, misrepresentations regarding historical facts, and omissions of events, some of which he may not even be aware of, he describes a cold and mechanical process that bears little resemblance to the collegial mode of operation and spirit of collaboration that has long marked the operations of this court. We simply do not do business in the unfriendly and adversarial way Judge Kozinski describes. Our internal time limits are not intended to operate as statutes of limitations and do not have the force of Federal Rules of Procedure. The critical fact, though, is that Judge Kozinski's revelations not only reveal a different judicial world than most of us are familiar with, but the revelations, even were they accurate, would be wholly irrelevant to the issue before us.

The questions the dissents principally address are whether this court's decision to recall the mandate was based on extraordinary circumstances and whether we somehow were guilty of circumventing AEDPA when we decided to hear Thompson's first habeas petition en banc. It seems apparent that if there were extraordinary circumstances that justified our sua sponte recall of the mandate in order to permit us to hear en banc *a first habeas petition* that we erroneously failed to review a few short months ago, there can be no possible violation of AEDPA. Accordingly, the real question is that of "extraordinary circumstances."

Surely, no-one could believe that it is an ordinary occurrence for all of the following to transpire in one case: (1) the misplacing or non-arrival in a judge's chambers of a form computer message causes a judge to miss an internal deadline for requesting en banc review of the first (and ordinarily the only possible) habeas petition in a death penalty case; (2) the judge realizes the glitch within a reasonable time and seeks such review with dispatch, as does another judge; (3) the three-judge panel unprecedentedly refuses to act favorably on the requests for an extension of time; (4) the internal rules regarding further possible action are ambiguous; (5) two other judges subsequently renew the request for en banc review of the first habeas petition prior to the time our mandate is spread; (6) several more judges urge that out of comity we wait to conduct our en banc vote until all state proceedings are completed; (7) the court will have no further opportunity to review the panel's patently erroneous decision if it fails to recall the mandate, while ff it does it will be able to conduct an initial en banc hearing on a first habeas petition; (8) the experienced district judge who was reversed by the panel had found in a one-hundred page opinion after a full evidentiary hearing that the capital defendant did not receive a minimally effective defense on the charge that triggered the imposition of the death penalty; (9) the district judge had concluded that even despite the ineffectiveness of defense counsel the prosecutor failed to present' substantial evidence of the charge which was the basis for the imposition of the death penalty; and (10) there is a substantial question whether the prosecutor by his unethical conduct deprived the defendant of due process of law and thus a fair trial.[2]

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2. I describe the facts as one might have described them conservatively at the time of the vote by the en banc court to recall the mandate. The fact is that the case could well be stated far more strongly. By the time the en banc court voted on the question of recalling the mandate it had already heard full argument on the merits and knew that it would be required to reverse the death-eligible conviction if the mandate were recalled. We not

To suggest that all of this is just an ordinary run-of-mill occurrence and that the panel's errors may be corrected in the next en banc case is mind-boggling. Surely, if a court wishes to correct its own errors in these extraordinary circumstances, as seven members of the en banc court voted to do, the court has the authority to do so.

Judge Kozinski's dissent addresses almost exclusively the question of whether procedural errors actually occurred within the court, how and why they came about, and what our internal rules actually provide when properly construed. In one of his amendments he purports to regret that he has been required to "delve into court communications."

As far as I am concerned, Judge Kozinski's delving is not only offensive and inaccurate but it serves no purpose. His delving cannot change the fact that two judges of this court sought to have an en banc hearing held at or about the normal time and two others sought to have it held before our mandate was spread in the district court. His delving cannot change the fact that the reason that a number of judges asked to have an en banc hearing on this first habeas petition in a capital case was to permit review on the merits of a panel opinion that erroneously decided two serious constitutional questions and that, unless overturned, would result in a manifest injustice.

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only had taken the "peek under the rug" described in the majority opinion, but we had heard and reviewed everything that was hidden under the rug. In short, we knew that we were being asked to recall the mandate, not, as Judge Kozinski suggests, in a case involving a "colorable" claim, but in a case in which we already knew that a capital defendant did not receive effective counsel on the charge that made him death-penalty eligible and had been deprived of due process of law as a result of prosecutorial misconduct. We also knew that if we failed to recall the mandate he would be executed without ever having received a fair chance for a full review in this court, notwithstanding that the evidence against him on the death-eligible charge was insubstantial.

No one familiar with this case has suggested, or could in good conscience suggest, that anything but honest errors and strong disagreements among judges about the appropriate procedures led to the fact that we did not take an en banc vote at the regular time. If anyone were to suggest otherwise, that suggestion would be both false and reprehensible. It is true that this case reveals disagreements on the court about the circumstances under which an en banc vote may be called following non-substantive amendments to an opinion. It is true that we appear to have disagreements about a panel's obligation to honor a reasonable request for an extension of time in an en banc case. It is true that a form 5.4(b) notice may have gone astray or unnoticed. The question of why these events occurred, however, is irrelevant.

Rather, the question is whether a person who has been deprived of a fair trial, both because of the ineffectiveness of his counsel and the due process violations of the prosecutor, and who in all likelihood is actually innocent of the death-qualifying offense, should be executed because a court of appeals made good faith mistakes or had good faith disagreements as to internal court procedures and, as a result, initially failed to afford him the en banc review that it would otherwise have conducted. Should a court of appeals, in other words, be prohibited from recalling a mandate sua sponte and correcting the grave constitutional errors made by a panel of that court when the court itself is responsible for the initial failure to hold an en banc hearing and when the capital case presents substantial claims of ineffectiveness of counsel, highly prejudicial prosecutorial misconduct, and actual innocence -- particularly when the district court found a substantial part of those claims to be true?

In my view, Judge Kozinski's attempt selectively to extract items from our internal correspondence[3] in an effort to show

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3. Selective quotations from internal memoranda can be highly

that the judges were guilty of simple, rather than excusable, neglect is wholly irrelevant. It is possible, as he suggests, that other procedural maneuvers could have been tried. That is a matter of judgment. That additional internal efforts to obtain an earlier en banc hearing were or were not pursued proves nothing. In the absence of a charge of bad faith, the specific nature of the errors really does not matter. The undisputed fact is that either because some judges inadvertently, erroneously, negligently or excusably failed to pursue the en banc call at the proper time, or because a three-judge panel arbitrarily refused to allow a late call in contravention of the court's long established practice, an en banc call did not occur at the time set by our internal rules. A majority of the judges wished to correct that error in order to remedy a manifest injustice in a capital case. The majority wished to review en banc a first habeas petition that in fact was meritorious, even though, by chance, error, or mistake, the call had not been made a few months earlier. The critical question is whether, under these extraordinary circumstances, a court of appeals is free sua sponte to recall the mandate in order to accomplish those objectives.

Judge Kozinski's essential response to the question before us can be summed up by a sentence of his that I quoted in Section I: "If the en banc call is missed for whatever reason, the error can be corrected in a future case where the problem again manifests itself." Kozinski Dissent at 10230. As I said earlier, that is not an acceptable response to those who believe that fairness and due process play some part, however small, in our legal system, or to those who believe that individual human life is both valuable and unique.

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misleading. Even the quotation of a full internal communication may give a false impression under some circumstances. The reader might be surprised to read, for example, the contents of a communication from Judge K in this case, if I were uncollegial enough to include it in this opinion.

This case *is* different from any other case we have had or are likely to have again. We cannot cut it into pieces, examine each piece separately and then say each piece is not unusual. Together the whole is extraordinary, probably as extraordinary a case as any of us has ever seen. Yet, to Judge Kozinski this is simply an everyday occurrence. Nothing unusual about it. We can correct the error in the next case. To the majority of this en banc court, that would come far too late. To us, this case is about a person who did not receive a fair trial and who is in all likelihood innocent of the offense of rape which underlies his scheduled execution. It is about a court that made an error not only in reversing a scrupulously careful district judge who vacated the rape conviction but also in failing to hold a timely en banc hearing at which we could have corrected our own mistake. It's about this court's ability to act to prevent a manifest injustice. It is about fairness, justice and due process of law.

TASHIMA, Circuit Judge, concurring, with whom JUDGE THOMAS joins:

I join in all of the majority opinion, except Part III, and concur in the judgment. As explained briefly below, I also concur in the major premise of Part III, but not in its result.

A homicide victim dies as a result of a gunshot wound inflicted with a single bullet. The prosecutor obtains a first-degree murder conviction of defendant A. In a separate trial, he also subsequently obtains a first-degree murder conviction of defendant B. The prosecutor's theory in each case is that the defendant on trial fired the gun. Few would argue that, at least in some circumstances, defendant A or defendant B (or both) has been deprived of due process. This is the major premise of Part III with which few would disagree. As the three-judge panel observed, "[f]rom these principles emerges the requirement that the prosecutor not pursue wholly inconsistent theories of a case at separate trials." *Thompson v. Calderon*, 109 F.3d 1357, 1371 (9th Cir. 1996), (citing *Haynes v. Cupp*, 827 F.2d 435, 439 (9th Cir. 1987)), *cert. denied*, 117 S. Ct. 2426 (1997).

I agree with the major premise of Part III that due process is violated when a prosecutor "pursue[s] wholly inconsistent theories of a case at separate trials." *Id.* I also agree with the majority that the prosecutor's theories in the two trials involved here were "fundamentally inconsistent" and, thus, violated due process.

The three-judge panel found no prejudice from the prosecutor's conduct and "[f]urther, we conclude that if any prejudice resulted from the differences in emphasis it would have affected Leitch, not Thompson." *Id.* (citation omitted). The majority opinion concludes that "[t]o the contrary, Thompson was prejudiced." To reach a conclusion of prejudice or no prejudice as to Thompson first requires a finding of which of the two inconsistent theories pursued by the prosecutor

represents the true facts and which is false. In the absence of a district court finding on the issue, the majority has made its own finding.[1]

Thus, although I agree that there was a due process violation, absent a finding of which version is true, I am unprepared to decide whether or not Thompson was prejudiced by it.[2] Because I am unprepared to make that finding on appeal on this record, I would remand to the district court for an evidentiary hearing on this issue.

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1. The majority's "finding" would also seem to require the prosecutor on Thompson's retrial to pursue the same theory he pursued at Leitch's trial. I am reluctant to impose this limitation on the prosecution, absent a finding on the issue.

2. Another way of viewing the issue is that without that finding, one cannot conclude which defendant, Thompson or Leitch (or perhaps both), was deprived of due process.

HALL, Circuit Judge, with whom T.G. NELSON, and KLEINFELD, Circuit Judges join, dissenting:

We dissent from the majority's unprecedented and arbitrary exercise of the court's power to recall our mandate.

I.

By recalling the mandate, and reconsidering the merits of our original opinion, the court has encouraged and enabled Thompson's attempt to end run the restrictions of the Antiterrorism and Effective Death Penalty Act ("the AEDPA"). The AEDPA requires that a habeas corpus petitioner base a second or successive application on a new rule of constitutional law or newly discovered facts that establish by clear and convincing evidence that no reasonable jury could have found guilt in the absence of constitutional error. 28 U.S.C. § 2244(b)(2). It also requires that any claim already presented in a prior application must be dismissed. 28 U.S.C. § 2244(b)(1). Finally, the petitioner must file an application making a prima facie showing that he meets these requirements and receive our permission before he can file a second petition. 28 U.S.C. § 2244(b)(3). We have expressly forbidden the recall of our mandate simply to avoid these procedural bars. *Nevius v. Sumner*, 105 F.3d 453, 461-62 (9th Cir. 1996). Otherwise, the successive petition constraints of the AEDPA are a dead letter.

Thompson's motion to recall the mandate is not -- and no one should think it is -- a request to recall the mandate for a genuine reason. It is, pure and simple, an attempt to skirt the AEDPA's successive petition requirements. Thompson's motion to recall the mandate was based exclusively on claims of newly discovered evidence.[1] That motion was virtually identical, as

1. Despite the majority's disclaimer of this "evidence" as grounds for their decision to recall the mandate, Thompson's motion is based *solely* on those grounds. It is that motion -- filed by Thompson -- which reflects his

counsel admitted at oral argument, to his Rule 60(b) motion filed in district court the same day.[2] If we treat the motion as a successive petition, as Rule 60(b) motions are and as this motion ought to be, the en banc court has no jurisdiction to entertain it. The court has not given permission for a successive petition to be filed, and indeed Thompson disclaims any intention of filing one. The en banc court therefore lacks jurisdiction under the AEDPA to go further.

When the majority disclaims Thompson's reliance on newly discovered evidence and bases its recall on the opinion reported at 109 F.3d 1358, it blatantly disregards the AEDPA and the Federal Rules of Appellate Procedure. Congress has made it very clear that a petitioner may not present for a second time claims which failed in prior habeas petitions. *See* 28 U.S.C. § 2244(b)(1). If Thompson tried solely to revisit the claims rejected in his first petition, his second petition (no matter how it is cloaked) must be dismissed by the court. 28 U.S.C. § 2244(b)(3)(B)-(C). The court's denial of such an application is not appealable and may not be the subject of a petition for rehearing. 28 U.S.C. § 2244(b)(3).[3] Although we maintain the

intent to end run the AEDPA. It was the denial of that motion which triggered this court's vote on whether to recall the mandate. *See* note 3, *infra*.

2. The district court denied that motion on July 25, 1997, correctly holding that the Rule 60(b) motion was to be treated as a successive petition for habeas corpus. *Clark v. Lewis*, 1 F.3d 814, 825 (9th Cir. 1993); *see also Felker v. Turpin*, 101 F.3d 657,661 (11th Cir. 1996); *Blair v. Armontrout*, 976 F.2d 1130, 1134 (8th Cir. 1992); *Kyles v. Whitley*, 5 F.3d 806, 808 (5th Cir. 1993), *rev'd on other grounds*, 115 S. Ct. 1555 (1995). The court then concluded that it lacked jurisdiction to consider Thompson's motion because he had not received prior authorization in this court to file a successive habeas petition, as required by § 2244(b)(3) of the AEDPA.

3. Nor could the en banc court decide *sua sponte* to recall the mandate. This court only has jurisdiction to rehear en banc "an appeal or other proceeding." F. R. App. P. 35(a). Absent a successful or failed motion to

power to recall our mandate, we cannot exercise that power in violation of our statutory jurisdiction.

II.

There are no "exceptional circumstances" justifying recall of the mandate in this case. The court's opinion filed today does not claim that there has been an intervening change in the law that would require us to revisit our settled judgment, nor does it rely upon any allegedly new facts supporting a claim of "actual innocence." What purports to be exceptional in this case is the neglect of two judges to make a timely call for en banc review upon belatedly deciding that they wished they had called one when they first received notice. While the majority gives lip service to the "exceptional circumstances" standard for recalling the mandate, the reasons given, oversight of two judges of this court, would not even rise to the level of "excusable neglect" under Rule 6(b) of the Federal Rules of Appellate Procedure. *See Pioneer Inv. Servs. Co. v. Brunswick Assoc. Ltd.*, 507 U.S. 380, 392 (1993) ("inadvertence, ignorance of the law or mistakes construing the rules do not usually constitute 'excusable' neglect"), *quoted in Committee v. Yost*, 92 F.3d 814, 824 (9th Cir. 1996) (Fletcher, J.).

When discussing "excusable neglect" in *Pioneer*, the Court said that the inquiry is an equitable one, taking into account all relevant circumstances, *id.* at 395, which include "the risk of prejudice to the nonmoving party, the extent of the delay, and the potential effect on judicial proceedings, the reason for the delay and whether the moving party acted in good faith." *Reynolds v. Wagner*, 55 F.3d 1426, 1429 (9th Cir. 1995). The majority's narrow focus on the neglect of two members of this court leads it to wipe from the books everything that has since happened, including the Supreme Court's denial of Thompson's

recall our mandate, there is no "appeal or other proceeding" to rehear.

petition for certiorari, the denial of his successive petition by the California Supreme Court, the denial of his Rule 60(b) motion by the district court, and the denial of his motion to recall the mandate by the panel. This neglect cannot be used to reverse the system of justice that has proceeded as a result of, and in reliance on, this court's final judgment.

Even worse, the majority only looks to that inexcusable neglect as part of the "totality of circumstances." According to the majority, recall of our mandate does not rely exclusively upon procedural "misunderstandings." Without assigning any factor particular weight, the majority also weighs Thompson's claims that: (1) he may be innocent; (2) the panel's decision may be wrong; and (3) the consequences are serious. Maj. Op. at 10186. These contentions are remarkably common and many a failed habeas petitioner will believe that he fits into a similar "totality of circumstances." In short order, this court will be flooded by motions to recall our established decisions. Worst of all, citing this case as precedent, many of these petitioners will be heard despite being barred by the AEDPA from seeking relief.

III.

Not only does the en banc court lack jurisdiction under the AEDPA, but it lacks authority under the court's rules to do anything more than what it was authorized to do when the court voted to go en banc. The active judges of this court voted to rehear the panel's decision which denied the motion to recall the mandate. Because there has never been a vote on whether to take the initial panel decision en banc, in effect the majority's approach amounts to a waiver of the requirement in section 5.4.b.(2) of our General Orders that an en banc call be made within 14 days after the panel gives notice that it rejects a party's suggestion for en banc rehearing.[4]

4. When a party has suggested rehearing en banc, the General Orders

The notion that an en banc court can itself decide whether to set aside our General Orders and authorize its own untimely en banc review of a panel decision suggests it can improperly bypass the General Orders themselves. Suspension of the General Orders can come only upon a proper two-thirds vote of the court, which, itself must follow the appropriate procedures. *See* G.O. 11.11.[5] If, on the other hand, the court's earlier vote to go en banc was also -- *sub silentio* -- one to set aside our General Orders and take the initial panel decision en banc, that vote failed to obtain the two-thirds majority required for the purpose. *See* G.O. 11.11. Thus, the merits of the initial panel decision cannot have been taken en banc as a result of that vote.

IV.

Rather than compound the error in the court's opinion filed today, we simply state that we would reverse the district court for the reasons stated in the court's original opinion. *Thompson v. Calderon*, 109 F.3d 1358 (9th Cir.), *cert. denied*, 117 S. Ct. 2426 (1997).

With respect to the successive habeas petition (disguised as a Rule 60(b) motion further disguised as a motion to recall the mandate), I would deny Thompson's petition if the court had the jurisdiction to do so. Thompson introduces alleged newly discovered evidence of actual innocence which, he argues,

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for a *sua sponte* call do not apply. *See* G.O. 5.4.c.(1)(a) ("Any judge may request a vote on rehearing a case en banc: (1) *sua sponte*; (2) in response to a panel's rejection of a judge's proposal for amendment (*see* G.O. 5.3, *supra*); *or* (3) in response to a party's suggestion or a panel's recommendation that a suggestion be rejected (*see* G.O. 5.4.(b)(2), *supra*).") (emphasis added).

5. "Any active judge may request that the court vote to suspend a provision or provisions of these orders . . . . Any proposed suspension must be approved by the number of votes that equals or exceeds two-thirds of the eligible judges." G.O. 11.11.

compounds his assertion of constitutional error at trial. Evidence of that innocence must be "so strong that a court cannot have confidence in the outcome of the trial unless the court is also satisfied that the trial was free of nonharmless constitutional error." *Schlup v. Delo*, 513 U.S. 298, 316 (1995). "[T]he evidence must establish sufficient doubt about his guilt to justify the conclusion that his execution would be a miscarriage of justice unless his conviction was the product of a fair trial." *Id.* As the district court properly concluded, Thompson 's evidence -- hearsay statements by Leitch which Leitch repeatedly contradicted -- do not approach this standard. *See Thompson v. Calderon*, No. CV-89-3630-DT (C.D. Cal. July 25, 1997).

CONCLUSION

The alleged newly discovered evidence, whether presented as a Rule 60(b) motion or as a request to recall the mandate, must be treated as a second and successive petition under the AEDPA. By entertaining this motion, the court nullifies Congress's clear intent in passing that act.

KOZINSKI, Circuit Judge, with whom Circuit Judge T.G. NELSON joins, dissenting.

I

I agree with this much of the majority's claim that there are exceptional circumstances in this case: Not every day does a court of appeals recall the mandate in order to reconsider an argument that has already been presented to--and rejected by--the Supreme Court in a petition for a writ of certiorari. So far as I know, this is a first anywhere, anytime. What happened here, then, to justify such an extraordinary departure from orderly procedure? The majority suggests that "our normal en banc process did not function in the intended manner." Maj. op. at 10181. In fact, nothing at all unusual happened; the process operated just as it's supposed to.

Here is how it all works: All suggestions for rehearing en banc, whether or not bundled with a petition for panel rehearing, are first considered by the panel that issued the opinion. *See* Circuit Advisory Committee Note (4) to Rules 35-1 to 35-3. A judge who has doubts about the panel's opinion must await the panel's action before calling for a vote on whether to take the case en banc, since the panel might solve the problem by amending the opinion. In order to be notified when the panel has acted, an off-panel judge must ask the panel for a 5.4(b) notice, named after our General Order of that number. The 5.4(b) notice, when issued by the panel, informs the full court of the panel's action and triggers the time for any judge still dissatisfied with the opinion to make an en banc call; the call must be made within 14 days of the issuance of the 5.4(b) notice. *See* G.O. 5.4(b)(2). These are the procedures applicable to all cases and every one of our judges is familiar with them; we use them every day.

In this case, an off-panel judge (Judge X) made a request for a 5.4(b) notice on September 27, 1996, and the panel duly

issued that notice on January 17, 1997.[1] In that notice, the panel informed the court that it was planning to make some minor changes to the opinion and otherwise to deny the petition. That memo was circulated, as is customary, by way of our internal e-mail system. Again, under our General Orders, if no judge calls for an en banc vote within 14 days of the 5.4(b) notice, the suggestion for rehearing en banc is deemed rejected and the panel is free to file an order to that effect. Adding 14 days to January 17 brings us to January 31; no en banc call was made as of that date. In an abundance of caution, the author of the opinion inquired of the judge charged with coordinating the en banc process and was advised that January 31 was, indeed, the last date to make an en banc call. Over a month later, on March 6, the order denying rehearing was filed with a revised opinion containing the small amendments mentioned by the panel in its 5.4(b) notice.

Six days later, on March 12, another off-panel judge (Judge Y) wrote to the panel asking that it withdraw the order denying rehearing in order to give that judge an opportunity to make an en banc call. The judge in question explained as follows the failure to make a timely call:

> I . . . attempted to determine why I had not become aware of your decision earlier. The answer appears to be that my chambers systems malfunctioned and the opinion simply fell between the cracks. A partial explanation, but not excuse, is that the disposition was circulated shortly before a law clerk

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1. I regret having to delve into internal court communications, especially as I do not believe any of this matters at all. *See* pp. 10229-31 *infra*. However, as the majority has opened the door by giving what I see as an inaccurate description of what happened, I feel constrained to set the record straight. I believe this is especially appropriate since the parties do not have access to these facts and thus have no way of challenging or defending the majority's assertions.

transition and that the old and new law clerks assigned to the case failed to communicate.

The following day, March 13, Judge X, who had originally requested the 5.4(b) notice, seconded the request. Four days after that, Judge X circulated a second memo noting that a timely 5.4(b) request had been made. "Was a 5.4(b) notice circulated? Did I miss it?", inquired Judge X.

The author of the opinion responded, noting the mandate had been stayed to allow petitioner to seek certiorari. On the question whether an en banc call could be made, the authoring judge stated as follows:

> On Monday, March 17, 1997, I sent you copies of papers from my file that demonstrate that you both had adequate notice of the panel's intent to amend the opinion and a 5.4(b) notice. The notice was sent to Associates on January 17, 1997.

The memo also noted that "[i]n compliance with our general orders, the en banc coordinator set the date of January 31, 1997 as the last date on which a timely call for en banc could be made" and confirmed that "the panel was under no further obligation to do anything in response to [the] request for a 5.4(b) notice dated September 27, 1996."

Neither Judge X nor Judge Y responded by claiming they did not receive the 5.4(b) notice. Neither argued at the time that they should be allowed to make a belated en banc call because of excusable neglect.[2] Neither judge notified the full

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2. While our General Orders provide time limits for taking certain actions, including the making of an en banc call, they are not self-executing. A judge who disagrees with the application of the General Orders can challenge the action and, ultimately, put the matter to a vote of the whole court. In this case, nothing precluded Judges X or Y from calling for en banc late. Had such a call been made, it would have been up to the en banc coordinator to determine whether it was timely; the en banc coordinator has traditionally exercised authority to waive certain time limits for excusable neglect and the like. Had the en banc coordinator ruled the call untimely, the aggrieved judges would have had two remedies: They could have appealed the ruling to the full court, arguing for a waiver on the basis of excusable neglect or collegiality or whatever, or they could have asked for a suspension of the rules pursuant to G.O. 11.11. The latter might have been harder than the former, but they could have done either or both. They did neither.

court that he felt aggrieved by the panel's unwillingness to waive the deadline as a matter of comity. In fact, this whole controversy--the claim that there was some compromise of the court's processes--did not come to the attention of the full court until after the Supreme Court denied certiorari, even though issuance of the mandate was safely stayed that entire time and any adjustment could have been accomplished without the extraordinary step of recalling the mandate.[3]

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3. Judge Reinhardt purports to dispute my account of what transpired. He is mistaken. As I state in the text, the full court *was* notified in March that Judges X and Y had missed the deadline. See p. 10228 *infra* ("Since [Judge X's memo] was written only 7 days after the amended opinion was filed, nothing prevented Judge X, Judge Y *or any other judge (we were all copied in on the memo)* . . . .") (emphasis added). What no one knew until July, is that Judges X or Y thought this reflected some "procedural misunderstandings" or that "our en banc process did not function in the intended manner." Maj. op. at 10181. Indeed, in his memo of March 12 Judge Y takes the entirely contrary position: "At this point all I can do is ask whether the panel might be willing to recall the mandate to permit me to make a prompt though belated call. *Under our rules, the decision is clearly yours.*" (emphasis added).

Judge Reinhardt also seems to dispute my assertion that the full court was not notified of the controversy until after the Supreme court denied certiorari. He says: "In addition, before our mandate was spread in the district court, two other judges also requested that a belated en banc call be entertained. Again, the entire court was notified immediately." Reinhardt concurrence at 10208. Here is what happened:

This recitation of events should make clear that there was nothing unusual about what happened in this case. The panel followed our procedures scrupulously; the en banc coordinator made an unremarkable ruling; there was no breakdown of our internal communications system. Two judges made mistakes--precisely the sort of mistakes lawyers make all the time and as to which we routinely hold they do not amount to excusable neglect. *See, e.g., Committee for Idaho's High Desert, Inc. v. Yost*, 92 F.3d 814, 824 (9th Cir. 1996), ("inadvertence, ignorance of the rules, or mistakes construing the rules do not usually constitute 'excusable' neglect," quoting *Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. Partnership*, 507 U.S. 380, 392 (1993)). At the same time, 35 other judges who were entitled to make an en banc call had reviewed the slip opinion and the suggestion for en banc rehearing and were satisfied that the result did not meet the rigorous standards for en banc review. Small wonder. While the majority now comes to a different conclusion than the three-judge panel, it does not indicate where the panel opinion was in conflict with the law of the circuit, the law of another circuit or the Supreme Court. In fact, the difference between the earlier opinion and this one involves only the application of law to facts, quintessentially the kind of case where en banc review is routinely rejected. Nor is this a case of transcending importance, unless one views every death case as exceptional. While the panel might have been more accommodating to Judges X and Y, the action is not unprecedented, particularly

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June 2, 1997	Supreme Court denies certiorari.
June 11, 1997	Ninth Circuit issues mandate.
July 7, 1997	Judge Z calls for belated en banc.

Judge Z's memo of July 7, almost a month after the mandate was issued, was the first that the court at large became aware that "there were procedural misunderstandings" or that "our en banc process did not function in the intended manner." Judge Reinhardt's assertion that "the entire court was notified immediately" is contrary to fact.

when the request was presented six weeks late and without any compelling reason for the delay.[4]

The majority also seems to suggest that Judges X and Y were misled because they were told they could not call for en banc, while the filing of an amended opinion in fact re-opened the period for making an en banc call. Maj. op. at 10182 & n.2. The short answer is that they were not misled. As the memo from the authoring judge quoted above makes clear, the en banc coordinator's ruling only held that the panel was "under no further obligation to do anything in response to Judge [X]'s request for a 5.4(b) notice dated September 27, 1997." Nothing and no one dissuaded Judges X or Y, or both together, from making a sua sponte en banc call on the basis of the amended opinion. No one addressed the point at all.

But maybe Judges X and/or Y were not aware of the possibility they could call for en banc review on the basis of the amended opinion, and were misled by the failure of the panel and the en banc coordinator to offer them this alternative. Not so. Judge X in the memo of March 13, 1997, said as follows: "I wonder whether in any event an amended opinion triggers a new 5.4(b) period." Since this was written only 7 days after the amended opinion had been filed, nothing prevented Judge X, Judge Y or any other judge (we were all copied in on the memo) from seizing this thought and asking for a 5.4(b) notice right there and then. The judge in question would not even have had to be sure that it would work; the request could have been made and the matter "litigated" before the en banc coordinator and the full court. *See* n.2 *supra*. Once again, the Judges Appellant had a full and complete remedy for the supposed breakdown in our processes, but did nothing.

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4. The majority's assertion that "there has been no occasion in the past several decades in which this court has made a similar error in any type of case," maj. op. 10184, is not accurate. It's happened to me more than once.

Where then is the beef? Where the extraordinary circumstances that empower us to exercise the seldom-used authority to recall the mandate? Where the affront to "the integrity of our processes" the majority complains about? Maj. op. at 10181. It just doesn't exist.

But let's assume, contrary to fact, that Judges X and Y were somehow hoodwinked out of their right to make an en banc call. It does not follow that this is something the petitioner can complain about. It has long been established that "[t]he function of en banc hearings is not to review alleged errors for the benefit of losing litigants," *United States v. Rosciano*, 499 F.2d 173, 174 (7th Cir. 1974) (en banc), citing *Western Pacific R.R. Corp. v. Western Pacific R.R. Co.*, 345 U.S. 247, 256-59 (1953). En banc review, rather, is a means for a multi-judge court that sits in panels of less than the entire number to bring consistency within its law. *See Western Pacific R.R.*, 345 U.S. at 260 n.20. Thus, the majority commits egregious error when it suggests that en banc review is "a part of the full and fair procedure our court affords in connection with initial habeas petitions." Maj. op. at 10183. A cursory review of the most elemental authorities on this point discloses this is just not so. The statute which grants power to the court to sit en banc gives the parties no rights whatsoever to require en banc rehearing, or even a consideration by the full court of the suggestion. *See, e.g., Western Pacific R.R.*, passim; Notes of Advisory Committee on Appellate Rules following Fed. R. App. P. 35 ("The provision that a vote will not be taken as a result of the suggestion of the party unless requested by a judge of the court in regular active service or by a judge who was a member of the panel that rendered a decision sought to be reheard is intended to make it clear that a suggestion of a party as such does not require any action by the court.").

The implications of this body of law for our case are rather clear. Since the en banc process gives no rights to the parties, a breakdown in the process--even if there was one--creates no

problem of extraordinary dimensions. If the en banc call is missed for whatever reason, the error can be corrected in a future case where the problem again manifests itself. Any problem worthy of en banc consideration will perforce appear again and again; missing an en banc call in a single case does not terminate forever the opportunity of judges troubled by the error to raise the issue. Thus, even were I to accept the majority's premises that something untoward happened here, I cannot see how this supports the extraordinary remedy of recalling the mandate.

That this is a capital case does not change the calculus. The stakes are higher in a death case, to be sure, but the stakes for a particular litigant play no legitimate role in the en banc process. Nor can we say that "death is different" and therefore that it is appropriate to impose more layers of procedural safeguards. The Supreme Court has already imposed quite a few layers of additional safeguards with respect to death cases. There is no indication anywhere in the Court's opinions that we are free to add to these safeguards by imposing an especially rigorous en banc review process. Indeed given that 28 U.S.C. § 46(c) and the 1967 Federal Rules of Appellate Procedure Amendments all were promulgated prior to *Furman v. Georgia*, 408 U.S. 238 (1972), it would seem quite strange to extract from them special procedures peculiarly applicable to death cases.

Ultimately, then, the majority's decision to recall the mandate must stand or fall on the other factors it cites in support of its action, such as Thompson's claim of actual innocence, the supposed errors in the panel's decision and the serious consequences to the petitioner. As Judge Hall points out, there are few petitioners who can't make out a colorable claim that some or all of these factors are present, and we will be hard pressed to distinguish them from Thompson's case. *See* Hall dissent at 10221. Given the difficulties imposed in filing second habeas petitions under AEDPA, we can expect a flood of requests to "recall the mandate".

II

While I would not reach the merits of the first habeas petition, I comment briefly on the portion of Judge Fletcher's opinion dealing with prosecutorial misconduct. Fletcher op. Part III. Because that portion of the opinion does not command a majority, it is more in the nature of ruminations by some of our judges. *See also* Tashima concurrence. As I find this issue troubling, I contribute a few random thoughts of my own.

To begin with, I do not agree with Judge Fletcher's broad statement that "it is well established that when no new significant evidence comes to light a prosecutor cannot, in order to convict two defendants at separate trials, offer inconsistent theories and facts regarding the same crime." *Id.* at 10203. There is, in fact, a long line of cases that says, if only by way of dicta, that judicial estoppel will not apply against the government in criminal cases. *See, e.g., Nichols v. Scott*, 69 F.3d 1255, 1272 (5th Cir. 1995); *United States v. McCaskey*, 9 F.3d 368, 378 (5th Cir. 1993); *United States v. Kattar*, 840 F.2d 118, 129-30 n.7 (lst Cir. 1988) (all noting that judicial estoppel has never been applied against the government in a criminal case). The matter is thus far from settled, much less "well established."

That said, there is surely something troubling about having the same sovereign, particularly acting through the same prosecutor, urge upon two juries a conviction of both A *and* B, when it is clear that the crime was committed by either A or B. To begin with, it raises the suspicion that the prosecutor may have presented testimony he knows, or has reason to believe, is false. If that be the case, the breach in prosecutorial ethics consists of putting on the tainted testimony, not in pursuing the inconsistent verdicts. But it is impossible to make judgments about what the prosecutor knew or should have known at our level, as Judge Tashima points out. *See* Tashima concurrence at 10215; *but cf.* Fletcher op. at 10197-98 (finding prosecutor's characterization of testimony "patently untrue"). Thus, if the

petitioner makes a prima facie case that the prosecutor knowingly presented false evidence, the matter must be resolved at an evidentiary hearing.

But, as Judge Kleinfeld points out, prosecutors are not omniscient. *See* Kleinfeld dissent at 10240. They may be confronted with witnesses who present mutually inconsistent versions of what happened, and there may be no way of knowing which version--if any--is true. Is the prosecutor then precluded from presenting either case to the jury? Must he pick one based on his intuition? I believe not. A prosecutor, like any other lawyer, is entitled to retain skepticism about the evidence he presents and trust the jury to make the right judgment. After all, the guarantee of due process encompasses a fair trial before a fair judge and jury; the right to a lawyer and to exculpatory evidence available to the prosecution; and the right not to have the prosecutor lie to the jury. But I cannot see that it encompasses the right to have a prosecutor who is convinced of the defendant's guilt. We trust the adversary process, the good sense of jurors, the presumption of innocence and the prosecution's heavy burden of proof to ensure a verdict that is fair to the defendant. If the system works as it should, A and B both may be acquitted, but in no event should more than one of them be convicted.

Must we be troubled, however, where the process does not work well where both A and B get convicted, despite the best efforts of everyone involved? I believe so. If A and B cannot both be guilty, we then know that one innocent person has been convicted. Whether this rises to the level of a due process violation is close to the question the Supreme Court posed in *Herrera v. Collins*, 506 U.S. 390 (1993): Is there a federal constitutional right not just to fair process, but also to a correct result? While the Supreme Court has not yet answered this question, the better view seems to be that the state has no right to execute an innocent man, however fairly it has obtained the conviction. In the case of mutually inconsistent verdicts, which I

am not sure is the case here, I believe that the state is required to take the necessary steps to set aside or modify at least one of the verdicts. While the authority for this position is far from ironclad, it is nonetheless compelling.

I start with *Durley v. Mayo*, 351 U.S. 277 (1956), where the Court granted certiorari to determine whether due process was offended by a conviction which was alleged to rest on perjured testimony, but the prosecutor had not been aware of the perjury at trial. The Court dismissed for lack of jurisdiction, but four Justices (Douglas, J., joined by Warren, C.J. and Black and Clark, JJ.) would have held that it is a denial of due process for the state to retain a conviction it later discovers was based on perjury. The Second Circuit in *Sanders v. Sullivan*, 863 F.2d 218 (2d Cir. 1988) (Kaufman, J.) took the same view.

Writing for himself and Justice Ginsburg, Justice Stevens relied on *Durley* in arguing that a stay should be granted in *Jacobs v. Scott*, 115. S. Ct. 711 (1995). (Justice Breyer would also have issued a stay.) Jacobs had been convicted of capital murder, and the state had then tried and convicted Jacobs's sister, based on Jacobs's own testimony. At the sister's trial, the prosecutor had argued that he now believed Jacobs had told the truth and it was the sister who killed the victim. Nevertheless, Texas insisted on executing Jacobs, and eventually did. Justice Stevens's dissent argues, like Judge Fletcher here, that the prosecutor committed misconduct at trial in presenting inconsistent theories. The facts in Jacobs are more compelling than in our case, but they raise the same basic issues. Whether or not one agrees with Justice Stevens and the judges joining Part III of Judge Fletcher's opinion that the prosecutor committed misconduct at trial by pressing inconsistent theories, it still seems mighty troubling for the state to take a prisoner's life after having publicly announced that it believes him to be innocent. I, however, would treat it as a denial of substantive due process rather than prosecutorial misconduct.

Which brings me to a final thought: Whatever the Supreme Court ultimately decides due process requires, it is unseemly for the state to act as it did in Jacobs and, perhaps, in our case as well. Whether or not the United States Constitution allows them to argue inconsistent theories to different juries, it surely does not inspire public confidence in our criminal justice system for prosecutors to leave themselves open to charges of manipulation. The danger is particularly grave in capital cases, where the manipulation could well cause the execution of an innocent person. That is a calamity none of us should contemplate lightly.

KLEINFELD, Circuit Judge, with whom T.G. NELSON, Circuit Judge, joins, dissenting:

I join fully in Judge Hall's dissent. I write separately because I think it necessary to comment upon the merits of the case, in view of the reasons stated in majority opinion. I write with some trepidation, because the last-minute aspect of this proceeding prevents me from mastering the record. Though death penalty cases are typically litigated for more than a decade, as this one has been, we are always presented with critical decisions to make in a procedural context that prevents us from knowing the record as well as in routine cases. For this reason, Congress and the Supreme Court have rightly seen last-minuteness as an obstacle to truth and justice.

Thompson raped a twenty year old woman, Ginger Fleischli, and then stabbed her five times in the head. When one of his thrusts of his knife penetrated 2 1/2 inches through her ear, it killed her. Then he and his roommate, David Leitch, carefully wrapped her up and threw her body away. *People v. Thompson*, 246 Cal. Rptr. 245 (1988). The people of California have decided to implement a death penalty, and they have the right to do that under the Constitution. A jury which, unlike the members of this court, heard and saw the testimony and other evidence, concluded that Thompson raped and murdered Ginger Fleischli, and that he should be executed for it. The majority concludes that the jury was wrong, the prosecutor was unethical, the defense lawyer was incompetent, the trial judge failed to protect Thompson from all this, and the three judge panel of this court was blind to the injustice of it all. Today's majority therefore thwarts the duly arrived at sentence even though the judges who disagreed with our panel failed to follow the rules to bring the matter before us in a proper and timely way.

If I agreed with the majority that Thompson was innocent, then the standard for recall of a mandate, "an overpowering sense of fairness and a firm belief that this is an exceptional

case requiring recall of the mandate in order to prevent an injustice," would apply. *Nevius v. Sumner*, 105 F.3d 453,460 (9th Cir. 1996). No one will ever get my vote to execute an innocent man because a judge or a lawyer missed a deadline. But there is no persuasive reason to doubt that Thompson had a fair trial, and that the jury had good reason to conclude that he raped and killed Ginger Fleischli. I am unable to share the majority's contempt for all the participants in that trial except Thompson.

There are three propositions critical to the majority opinion: (1) the evidence that Thompson raped Ms. Fleischli was negligible except for the jailhouse informants' testimony; (2) Thompson's lawyer did a terrible job of showing that Thompson did not rape Ms. Fleischli and that the jailhouse informants should not be believed; (3) the prosecutor violated the Constitution in Thompson's case by telling the jury in the Leitch case, a considerable time later, a different theory he then had of how the crimes were committed. Not one of these three propositions has a sturdy enough foundation to support the procedurally extraordinary action we take today.

If this jury was like most I have seen, it would not have convicted a man based on the word of a couple of criminals in jail. Here are nine other reasons (I am sure the jury had more, because it, unlike us, saw and listened to Thompson testify, and heard and saw all the other evidence) why the jury could reasonably have concluded that Thompson raped Ms. Fleischli before he murdered her.

1. Ms. Fleischli had sex with someone -- there was semen in her body.

2. Ms. Fleischli's blouse and bra were cut and pulled down her arms, suggesting that the sex was against her will, that the person who had sex with her meant to keep her from using her arms and hands to interfere, and that the person having sex with her was aggressive with a knife. The majority suggests that the

restraint was more likely connected with the murder than the rape, but I see no reason why jurors could not have thought Thompson restrained Ms. Fleischli's arms the better to rape her.

3. Thompson admitted he had sex with Ms. Fleischli, but claimed she consented.[1]

4. Thompson was carrying handcuffs when he was arrested in Cabo San Lucas, Mexico, suggesting that his modus operandi for committing crimes was to immobilize the victim's arms.

6. Ms. Fleischli was murdered by Thompson, a fate more frequent among rape victims than friendly sex partners.

7. Ms. Fleischli's bruises suggested handcuff injury and violence used to compel her to do something against her will.

8. Ms. Fleischli may have douched or washed after sex. The majority thinks this shows the sex was consensual, but a jury could have inferred the opposite, that if a rape victim persuaded the perpetrator to let her go to the bathroom, she would wash the crime away from the inside and outside of her body as best she could, in whatever time she had.

9. Thompson lied, at first denying that he had sex with Ms. Fleischli, and then claiming he had consensual sex with her. His

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1. The new evidence alluded to by the majority and Judge Hall is a defense paralegal's affidavit about her interview of Thompson's roommate Leitch in prison and other consistent material. Leitch told her that he had walked into the entryway of the little apartment around 3:00 AM, saw Thompson having sex with Ms. Fleischli on the floor, and turned around and left. Leitch believed that the sex was consensual. If a jury believed Leitch saw what he claimed, his story would corroborate the proposition that Thompson had sex with Ms. Fleischli. Because Leitch says he turned around and left, not that he stayed in the room and asked Ms. Fleischli how she felt about it. I do not see how his glimpse of two people having sex proves that the woman wanted it.

testimony was full of lies presented with extraordinary effrontery.[2]

None of the nine listed matters depend on the jailhouse informants the majority thinks could have been impeached better. The majority's suggestion that without the jailhouse informants, the evidence could not have sustained a rape conviction, is an insult to the jury.

I do not think the majority's attack on defense counsel is fair. Thompson was sentenced to death because he raped and murdered Ginger Fleischli, not because he had a bad lawyer. The only really disastrous event for the defense that could have been avoided was Thompson's testimony. Thompson personally, by talking to the jury, probably persuaded them that he was a liar, and would not lie if the truth would set him free. Fortunately (from the viewpoint of the truth-seeking purpose of

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2. Governor Wilson's careful decision denying clemency quotes this extraordinary passage:

> Q. Let me clarify Saturday morning, September 12 [the morning after the murder]. Did you, or did you not, say Ginger left with Shawn [Kashani] to Tracy?
>
> A. I did not, sir.
>
> Q. Then why did you tell that to [police investigators] Owen and Coder?
>
> A. Because at that time, as I said before, he [Shawn] seemed as likely a candidate as anybody.
>
> Q. So you lied about that too?
>
> A. I did, sir.

Jurors might have thought that a man who would lie and try to frame a friend, would readily lie about whether he had raped a woman he murdered.

a trial) Thompson insisted on testifying, against his lawyer's strenuous advice, so the jury got to see and hear him.

Thompson's lawyer got the state's own pathologist to admit to the jury that "[t]here is no anatomical evidence of rape. There is nothing to indicate it whatsoever." He also got the state's pathologist to admit that vaginal tearing or bruising was common in rape, yet absent here. That is about as good as it gets, for expert testimony in a rape case. The majority thinks defense counsel should have called his own witness to gild the lily. Most good trial lawyers avoid calling their own experts when they get what they need from the other side's witness, because the jury is more likely to believe the evidence from the mouth of someone not hired and paid to say it. Had Thompson's lawyer put on his own expert and had his expert been impeached, then the jury might well have disregarded both of them, and Thompson would have lost the benefit of the state pathologist's admissions.

The majority also thinks defense counsel should have hammered more on what liars the jailhouse informants probably were. Most good trial lawyers would let the jury draw its own conclusion after hearing, as they did, that the informants had multiple felonies, heroin use, used language suggesting they had read their information in the newspaper, obtained special favors, gave inconsistent stories, and perhaps were paid off by Leitch's family. The three judge panel did not decide whether counsel was ineffective, because there was no prejudice. I see no reason to disagree with that, but suggest also that the case for ineffectiveness has not been made.

The other ground stated in the majority opinion[3] is that the prosecutor urged one theory for how and why Ms. Fleischli was murdered in Thompson's trial, and a different one in

3. It may be that less than a majority of our en banc panel agrees to this proposition.

Leitch's trial some time later. We, not prosecutors, are supposed to adhere to stare decisis. That is because equal justice for all requires that we decide like cases alike. Prosecutors are not bound by the principle of stare decisis, because they do not decide cases. A prosecutor cannot present evidence or a case he knows to be false. But there is no reason to think the prosecutor knew either theory he presented was false, when he presented it or at any time.

Thompson, Leitch, and Ms. Fleischli were all in the tiny apartment the night Ms. Fleischli was raped and murdered. The prosecutor was not. The only way the prosecutor could find out what happened was to ask the surviving liars, consider the physical evidence, and think about what made sense. The majority opinion claims that "it is well established" that a prosecutor cannot offer inconsistent theories in successive trials, but its own authority shows that the proposition is not "established" at all. In *Haynes v. Cupp*, 827 F.2d 435 (9th Cir. 1987), we affirmed despite a claim of inconsistent prosecution theories. We said the theories were consistent, so we did not have to consider whether it would have mattered, had they been inconsistent. In the majority's other case for the supposedly "well established" principle that prosecutors must stick with the first theory they came up with, only one judge, concurring in a 12 judge en banc, said so, and that was in "the peculiar facts of this case," not generally. *Drake v. Cupp*, 762 F.2d 1449, 1479 (11th Cir. 1983) (Clark, J., concurring). The majority makes up a novel principle, cites no good authority for it, and claims incorrectly that the principle is "well established."

There is no reason why the prosecutor's change of theory at a later time should be treated as a due process violation.[4] The

4. We need not decide whether there could ever be a case in which justice required that the government be estopped from urging inconsistent theories in different cases, *cf. Risetto v. Plumbers & Steamfitters Local 343*, 94 F.3d 597 (9th Cir. 1996), or whether the government can never be estopped

standard boilerplate instruction tells juries that "arguments of counsel are not evidence." Devitt & Blackmar, *Federal Jury Practice and Instructions* § 12.03; *Ninth Circuit Manual of Model Jury Instructions - Criminal* § 3.05. The jury is supposed to decide the case based on the evidence and the judge's instructions. The lawyers offer the jury theories to help them make sense of the evidence. But the twelve jurors often have more diverse and extensive experience in life than the lawyers, and make better sense of the evidence than the lawyers. The lawyers were not at the scene of the crime, and can only, like the jurors, draw inferences. It is up to the jury, not the prosecutor, to decide what happened amidst a lot of lies.

The majority rightly says that the prosecutor must seek above all to do justice, but seems confused about what justice is. The duty to do justice in no way conflicted with the duty to seek Thompson's conviction, because there is absolutely nothing in the record to suggest that the prosecutor knew or thought that Thompson was innocent. If, as the jury reasonably concluded, Thompson raped Ginger Fleischli and then stabbed her to death through the ear, then the cause of justice coincided exactly with convicting him. Ginger Fleischli was entitled to justice--life and the liberty not to be raped, and conviction and punishment of the man who took these rights away from her.

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in a criminal case, as the authorities marshalled by Judge Kozinski suggest. Nor need we decide whether due process could ever bar conviction of two people on different theories. There is nothing in the circumstances of this case to support the proposition that the prosecutor's offer of a different theory to the jury in Leitch's substantially later trial creates any bar to Thompson's conviction in the earlier trial.

ORDER
Filed August 3, 1997

[Caption Omitted in Printing]

RYMER, Circuit Judge:

Now that it is clear that the en banc court has gone beyond deciding whether to recall the mandate, and has reconsidered the panel's decision on the merits, I wish to be recorded as dissenting from the decision to go en banc. The active judges of this court have never voted on whether to reconsider en banc the panel's decision reversing the district court's issuance of the writ, and I therefore believe the en banc court is without authority to do so.

There is a right way for Thompson's claims to be considered. This isn't it; the AEDPA is.

I therefore join in the dissents filed by Judge Beezer and Judge Trott.

ORDER
Filed August 3, 1997

[Caption Omitted in Printing]

FERNANDEZ, Circuit Judge:

I hereby order that I be shown as joining in the dissents of Judges Beezer and Trott to the decision to take this case en banc, which was filed July 30, 1997.

ORDER
Filed August 4, 1997

[Caption Omitted in Printing]

Before: HUG, Chief Judge.

A judge sua sponte requested a vote on whether the full court should rehear the case en banc. The request failed to receive a majority of the votes of the nonrecused active judges of the Court. The request is denied.

AFFIDAVIT OF SERVICE BY COURIER

Attorney:	No. 97-215 October Term, 1997
DANIEL E. LUNGREN Attorney General of the State of California HOLLY D. WILKENS Supervising Deputy Attorney General 110 West A Street, Suite 1100 San Diego, California 92101 P.O. Box 85266 San Diego, California 92186-5266	**ARTHUR CALDERON, Warden,** **California State Prison at San Quentin,** **Petitioner,** v. **THOMAS M. THOMPSON,** **Respondent.**

I, THE UNDERSIGNED, say: I am a citizen of the United States, am 18 years of age or over, employed in the County of San Diego, in which County the below-stated courier service originated, and not a party to the subject cause, my business address being 110 West A Street, Suite 1100, San Diego, California 92101.

I have served the within **JOINT APPENDIX** as follows: By placing one copy in a separate envelope addressed for and to each addressee named as follows:

GREGORY A LONG
SHEPPARD MULLIN RICHTER & HAMPTON
333 S HOPE ST 48TH FLR
LOS ANGELES CA 90071
Counsel for Petitioner
and Attorney of Record

Each envelope was then sealed and with the fees prepaid deposited in the internal collection system at this Office of the Attorney General, for deposit in the ordinary course of business with the commercial courier service United Parcel Service (UPS) on the seventeenth day of September, 1997, for delivery on the following day.

There is a delivery service by United Parcel Services (UPS) at each place so addressed or regular communication by United Parcel Services (UPS) between the place of dispatch and each place so addressed.

I declare under penalty of perjury that the foregoing is true and correct.

Dated at San Diego, California, September 17, 1997.

STEPHEN MCGEE

CALIFORNIA

ALL-PURPOSE

ACKNOWLEDGEMENT

STATE OF CALIFORNIA)

COUNTY OF San Diego)

On 9/17/97 (DATE) before me. Christine J. Kaul, Notary Public. (NAME, TITLE OF OFFICER - E.G., "JANE DOE, NOTARY PUBLIC")

personally appeared. Stephen McGee

personally known to me (or proved to me on the basis of satisfactory evidence) to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

WITNESS my hand and official seal.

Christine J. Kaul (SEAL)

NOTARY PUBLIC SIGNATURE

PWR1 CHRISTINE J. KAUL Comm. # 1034176 NOTARY PUBLIC CALIFORNIA San Diego County My Comm. Expires July 31, 1998 PWR1

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Attorney:	No. 97-215 October Term, 1997
DANIEL E. LUNGREN Attorney General of the State of California HOLLY D. WILKENS Supervising Deputy Attorney General 110 West A Street, Suite 1100 San Diego, California 92101 P.O. Box 85266 San Diego, California 92186-5266	**ARTHUR CALDERON, Warden,** **California State Prison at San Quentin,** Petitioner, v. **THOMAS M. THOMPSON,** Respondent.

I, THE UNDERSIGNED, say: I am a citizen of the United States, am 18 years of age or over, employed in the County of San Diego, in which County the below-stated mailing occurred, and not a party to the subject cause, my business address being 110 West A Street, Suite 1100, San Diego, California 92101.

I have served the within **JOINT APPENDIX** as follows: By placing one copy in a separate envelope addressed for and to each addressee named as follows:

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SAN FRANCISCO CA 94107

CLERK OF THE COURT
FOR HON ROBERT R FITZGERALD
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MICHAEL R CAPIZZI
DISTRICT ATTORNEY
COUNTY OF ORANGE
P O BOX 808
SANTA ANA CA 92702

CALIFORNIA APPELLATE PROJECT
ATTN LINDA LENKER
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SAN FRANCISCO CA 94105

Each envelope was then sealed and with the postage prepaid deposited in the internal mail collection system at this Office of the Attorney General, for deposit in the ordinary course of business in the United States Postal Service at San Diego, California, on the seventeenth day of September, 1997.

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I declare under penalty of perjury that the foregoing is true and correct.

Dated at San Diego, California, September 17, 1997.

STEPHEN MCGEE

CALIFORNIA

ALL-PURPOSE

ACKNOWLEDGEMENT

STATE OF CALIFORNIA)

COUNTY OF San Diego)

On 9/17/97 (DATE) before me. Christine J. Kaul Notary Public (NAME, TITLE OF OFFICER – E.G., "JANE DOE, NOTARY PUBLIC")

personally appeared. Stephen McGee

personally known to me (or proved to me on the basis of satisfactory evidence) to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

WITNESS my hand and official seal.

CHRISTINE J. KAUL
Comm. # 1034176
NOTARY PUBLIC CALIFORNIA
San Diego County
My Comm. Expires July 31, 1998

PWR1 PWR1

Christine J. Kaul (SEAL)
NOTARY PUBLIC SIGNATURE

OPTIONAL INFORMATION

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